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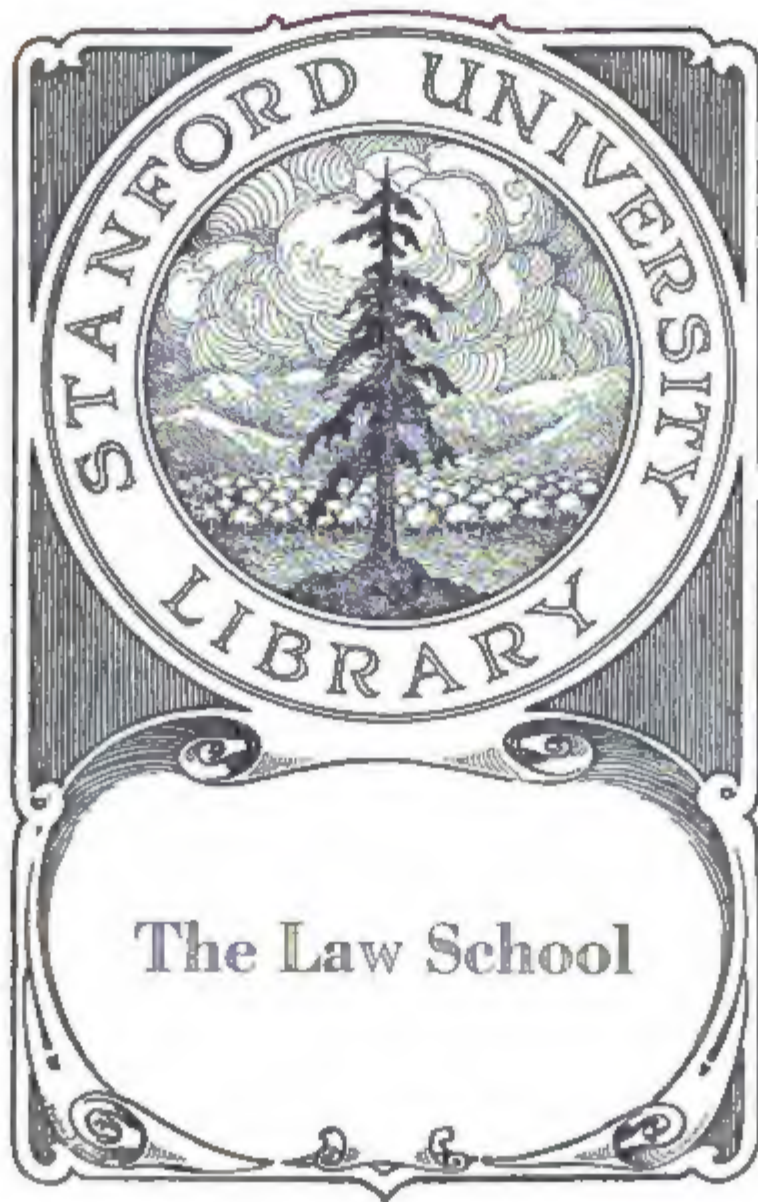
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~~Alfred Marshall~~

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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

ECCLESIASTICAL COURTS

AT

Doctors' Commons.

By W. C. CURTEIS, LL.D.

ADVOCATE.

VOL I.

CONTAINING CASES FROM MICHAELMAS TERM 1834, TO
MICHAELMAS TERM 1838.

LONDON:

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CHANGES
IN THE
ECCLESIASTICAL COURTS.

IN MICHAELMAS TERM, 1834.

The Right Honourable Sir Herbert Jenner, Knt., took his seat as Dean of the Arches, and Judge of the Prerogative Court of Canterbury. The Right Honourable Sir John Nicholl having retired in the Long Vacation.

Sir John Dodson, Knt., was appointed his Majesty's Advocate General, *vice* Sir Herbert Jenner.

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ERRATA.

- Page 3, line 9, for "Mr." read "Mrs."
- 5, in the 4th line from the bottom, for "Whisk," read "Whish."
- 7, in the second line from the top, after "which," insert a comma.
- 9, in the marginal note, for "ceremonies," read "circumstances."
- 11, in last line but one, for "non-propounded," read "now propounded."
- 13, 26th line, for "handwriting done," read "handwriting alone," with a comma after alone.
- 4th line from the bottom, for "has," read "is."
- 14, before "deceased," insert "the," and in various places throughout.
- 15, in the 15th line, for "facts," read "parts."
- 23, in the 19th line, dele "the."
- 49, in the marginal note, for "c. 26," read "c. 76."
- in the 13th line, after "England," insert "and Ireland."
- 59, in the 10th line, for "knowing," read "nothing."
- 70, line 23, after "blame," insert "might."
- " 24, for "petitioners," read "practitioners."
- 72, " 12, for "prohebitur," read "prohibetur."
- 78, " 30, after "made," insert "and"
- 80, " 22, after "confirmatory of it," insert a comma.
- 82, " 29, for "and," read "or."
- 97, " 5, after "codicils," insert semicolon, and after "dated," dele semicolon, and insert a comma.
- " 14, for "envelop," read "envelope."
- 101, " 15, after "inquire," insert a comma.
- 103, " 9, for "envelop," read "envelope."
- 105, " 3, for "circumstances," read "circumstance."
- 107, " 2, dele comma after "right," and insert a semicolon.
- 118, " 15, for "Hillary," read "Hilary."
- 123, " 26, for "wills and land," read "wills of land."
- 126, " —, and in several places in the judgment, for "deceased," read "the deceased."
- 134, " 4 from the bottom, for "for," read "of."
- 135, last line but one, for "bonà," read "bona."
- 146, line 10, after the word "about," insert "it."
- 167, " 20, dele "this witness," and insert "Heath."
- 193, in the marginal note, insert "institute" after the words "to enable him to."
- 214, in the first line, for "proceeding," read "proceedings."
- 295, line 2, after "witnesses," insert semicolon, and dele semicolon after "prima facie."
- 399, line 18 of the note for "searched," read "reached."
- 483, first line, for "precise," read "precisely."
- 547, at the end of the 21st line, insert "it."
- 559, line 10, read "contumaciæ."
- 597, eleventh line of the marginal note, for "at," read "ab."
- 662, in the last line of the marginal note, for "Geo. 5," read "Geo. 4."
- 737, line 18, for "Bann," read "Bunn."

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

ECCLESIASTICAL COURTS

AT

Doctors' Commons.

PREROGATIVE COURT OF CANTERBURY.

IN THE GOODS OF SIR ROBERT WILMOT, BART.,
DECEASED.

SIR ROBERT WILMOT, late of Osmaston, in the County of Derby, Baronet, died on the 23rd of July, 1834, having made his will, bearing date the 3rd of May, 1834, and thereof appointed executors as follows: "I appoint the said Valentine Browne, Earl of Kenmare, Charles Foley Wilmot, Eardly Nicholas Wilmot, William Simpson, and John Benbow, executors of this my will,"—"provided always, and I do hereby declare and direct, that in case any one or more of them the said Valentine Browne, Earl of Kenmare, Charles Foley Wilmot,

1834.

MICHAELMAS
TERM,
Nov. 6th,
1st Sessions.

Appointment of
executor, pro-
vided he proved
the will within
three calendar
months next
after the death
of deceased, in
computing the
time, the day
of the death
excluded.

1834.

MICHAELMAS
TERM,
Nov. 6,
1st Session.

IN THE GOODS
OF SIR ROBERT
WILMOT, BART.
DECEASED.

Eardly Nicholas Wilmot, William Simpson, and John Benbow shall be absent from Great Britain at the time of my death, and shall continue absent therefrom for the space of three calendar months next after my decease, or if any one or more of them shall not prove my will within three calendar months next after my death in the Ecclesiastical Court, then, and in either of such cases, the appointment of him or them, as an executor or executors, shall become null and void, and is hereby revoked accordingly." Probate of the said will had been granted to Eardly Nicholas Wilmot, and John Benbow, two of the executors, they having proved the same within three calendar months after the death of the testator, power being reserved of making the like grant to the other executors, provided they, or either of them, should apply for the same *within three calendar months after the death of the said testator*. On the 23rd of October, Charles Foley Wilmot, who had been absent from England for some time on the affairs of the estate applied to be joined in the probate, and was sworn as executor; but some difficulty having arisen in the registry, as to whether the day of the death of the testator should be included or not in calculating the time specified. The king's advocate moved the Court to decree probate to pass to Mr. Charles Foley Wilmot, and contended that the rule of law was that the day of the death should be excluded, and cited the case of *Lester v. Garland*, 15 Vesey, 248; and the Court being of that opinion directed the probate to pass.

CONSISTORY COURT OF LONDON.

SERGEAUNT v. SERGEAUNT.

On admission of an Exceptive Allegation.

1834.

MICHAELMAS
TERM,
Nov. 18,
2nd Session.

SERGEAUNT
v.
SERGEAUNT.

THIS was a cause of divorce by reason of adultery, brought by James Sergeaunt Esq. against Harriet Sergeaunt his wife. A countercharge of adultery against the husband was set up in an allegation brought in on the part of Mrs. Sergeaunt. Publication had passed in the cause. An allegation was now offered on the part of Mr. Sergeaunt, exceptive to the testimony of Elizabeth Cullen, a witness who had been examined on the 5th article of Mr. Sergeaunt's allegation.

The exceptive allegation pleaded,

First, That no faith or credit is, or ought to be given to Elizabeth Stephens, wife of John Stevens, a witness produced, sworn, and examined on the part and behalf of Harriet Sergeaunt, one of the parties in this cause, by the names and description of Elizabeth Cullen, wife of John Cullen.

Second, That the said Elizabeth Stephens, in her deposition on the fifth article of the allegation given in, and admitted on the part of Harriet Sergeaunt, and in answer to the last of certain interrogatories on the part of James Sergeaunt, Esq., had sworn and deposed that "her maiden name was Walkins; that she married a man named Stephens; that the said Stephens died, and that her real name is Cullen;" that she had therein knowingly and wilfully sworn and deposed falsely, for the truth and fact was,

1834.

MICHAELMAS
TERM,
Nov. 18.
2nd Session.

SERGEAUNT
v.
SERGEAUNT.

and is, that John Stephens, her lawful husband, the person meant and intended by her in her said deposition, was, and is still living, and that the same was well known to the said Elizabeth Stephens at the time of her said examination, and that the name of Cullen is not now, and was not then her true and proper name as falsely sworn and deposed to by her.

THE COURT.

DR. LUSHINGTON.

Facts collate-
ral to the point-
in issue, can-
not be pleaded
in exception to
the character
of a witness.

The present question arises on the admissibility of an allegation exceptive to the testimony of Elizabeth Cullen, a witness examined on behalf of Mrs. Sergeaunt. The allegation pleads in the first article that no faith or credit is to be given to Elizabeth Stephens, a witness produced, sworn, and examined as Elizabeth Cullen. And it goes on in the second article to plead that she has deposed "that her maiden name was Walkins; that she married a man named Stephens; that the said Stephens died; and that her real name is Cullen." And it alleges that she has knowingly and wilfully sworn falsely; for that John Stephens, her lawful husband, was, and is still living, and that the same was well-known to the witness at the time of her examination, and that Cullen is not her true and proper name.

In opposition to this allegation three objections have been stated,

First, That if this allegation were admitted, it would put in trial issues collateral to the cause; and it is contended, on behalf of Mrs. Sergeaunt, that that cannot be done.

Second, Because it charges the party with the commission of a crime without producing the re-

cord of conviction, which is the only admissible proof in such a case.

Third, Because the allegation differs from the accustomed mode of pleading by the omission of the word *corruptly*.

Upon the first point it is clear that this allegation does contain averments, which, if put into a train of proof, would be foreign to the issue in the cause.

The question then for me to determine is, whether a proof of collateral issues can be allowed for the purpose of discrediting a witness.

At common law there can be no doubt that if a witness be asked a question, foreign to the issue in the cause, the party asking that question must abide by the answer he receives, and cannot be admitted to produce evidence for the purpose of showing that the witness in this respect has been guilty of perjury. This is the rule laid down in *Spencely v. De Willott*, (a) Lord Ellenborough adding, "that he had ruled the point again, and again, till he was quite tired of the agitation of the question; and therefore he wished that a bill of exceptions should be tendered by any party who was dissatisfied with his judgment, that the question might be finally put at rest."

And, in the proceedings against her late Majesty, Lord Tenterden delivered the opinion of the judges, affirming the principals of the case cited.

This doctrine has been expressly recognized, as the rule governing the practice of these courts, by Sir John Nicholl, in the case of *Whisk and Woollatt against Hesse*; (b) and it would be exceedingly inconvenient that our practice should differ from that of other courts.

1834.

MICHAELMAS
TERM,
Nov. 18.
2nd Session.

SERGEAUNT
v.
SERGEAUNT.

(a) 7 East, 108.

(b) 3 Hagg. 680.

1834.

MICHAMAS
TERM,
Nov. 18.
2nd Session.

HEROEAUNT
v.
HEROEAUNT.

It has been said that in point of fact allegations objectionable on this ground have been admitted ; but I am not aware that there exists any case whatsoever before these tribunals in which, after opposition and on debate, an allegation violating the principles already stated has been admitted to proof.

Then the case stands thus : the rule at common law is clear ; it is sanctioned by the highest authority in ecclesiastical law—it is met by no contradictory decision.

Whatever might be my own opinion, it would be my duty, as the judge of an inferior court, to follow out in practice a doctrine so sanctioned. But I think it right to add, that so far from entertaining any doubt whatsoever of the soundness of the principle upon which the rule is founded, I am thoroughly convinced that for prevention of endless litigation, and excessive expense, as well as for the ascertainment of the truth, it is for the advantage of all the suitors that I should rigidly adhere to the rule so established ; I therefore reject the allegation.

This objection being sufficient, I shall not consider the others that have been raised ; but I must observe that they are also worthy of serious consideration.

—◆—
LAMBERT v. LAMBERT.

—
On admission of an Allegation.
—

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THIS was a suit for restitution of conjugal rights, brought by Georgiana Charlotte Lambert against William Charles Lambert, Esq., her husband.

An allegation had been admitted on the part of

the husband, charging the wife with adultery; in the sixth article of which exception, on the ground of general bad character, had been taken to the testimony of Mary Cox, a witness produced by Mrs. Lambert.

The present allegation was offered in support of the character of Mary Cox, and was opposed by *Phillimore*.

Addams and Nicholl were heard in support of it.

DR. LUSHINGTON.

This allegation is offered on behalf of Mrs. Lambert, in opposition to an allegation given in by Mr. Lambert, in which an article states that Mary Cox is a person of bad character.

It is clear that, in an allegation in these general terms, the examiner ought not to take down particular facts.

In answer to this general averment, it is pleaded that Mary Cox is not a person of bad character, but is a person of good character; and there is no doubt that it is competent to the party to plead so far; but a question of some importance arises as to the remainder of the article: it goes on specifically to plead, "that the said Mary Cox lived for twenty-five years, or thereabouts, with General Norcut; that she afterwards went to live with Mr. and Mrs. East;" it then goes on further to plead, that whilst living with Mr. and Mrs. East, "she was suspected and falsely accused of purloining certain articles."

The objection raised is, that supposing the Court were to admit this allegation many issues would be introduced which are not material to the real question in the cause.

If this allegation were admitted, it would certainly be competent to the other party to contradict

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every averment contained in it: what then would be the consequence? Not only would the Court have to inquire into each particular fact set forth—but it might be pleaded that she was not falsely accused of stealing certain articles, and the consequence would be that this Court would have to try a felony. Now, unless I found myself bound down by precedent, I should be considerably alarmed at such a result. But the allegation goes on further: “that she has attended ladies as a monthly nurse, and has constantly given satisfaction.” Now, this does appear to me, in principle, not only unnecessary, but detrimental to the true course of justice.

The expences would be increased to a considerable extent: and I do not see the necessity of this inquiry—witnesses will be produced to the general good character, and the examiner in taking the evidence on the allegation will be justified without pleading the specific fact, in taking down from General, and Mrs. Norcut, the circumstance of the long residence of the witness in their family, and this not as a specific fact whereby to support her character, but as the grounds of their knowledge, and enabling them to give their evidence.

It is true that in some very particular cases such an investigation might by possibility tend to the elucidation of truth; but Courts of Justice cannot adapt their system to a few extraordinary cases; the great object to be sought for, is, that mode of administering the law which may produce justice in the great majority of cases, without overwhelming it by extravagant expense, or destructive delay: it is upon these principles I apprehend that collateral issues are excluded; and that trial of such matter as is contained in the latter part of this allegation is forbidden.

PREROGATIVE COURT OF CANTERBURY.

BUSSELL v. MARRIOTT.

The King's Advocate and Addams for Bussell.*Lushington and Nicholl*, contra.

JUDGMENT.

SIR HERBERT JENNER.

This case has been very fully and elaborately argued ; at the same time the Court has not felt any doubt, or difficulty, as to the result upon the principles established here, it would come to.

The question arises upon the validity of a codicil to the will of the Rev. Daniel Pettiward, deceased, rector of One House in the County of Suffolk, and vicar of Finborough, the adjoining parish. He died on the 14th of November, 1833, a bachelor, leaving two nieces, his only next of kin, one married to Captain Bussell, and the other to Dr. Terry.

The deceased left two testamentary papers which are undisputed—a will, dated 4th May, 1832, and a codicil of 6th June, 1833. The codicil in question bears date on the 14th May, 1833.

The will and codicil of June are formal papers, and regularly executed ; that in dispute is informal, not drawn up by a professional person ; it purports to be signed by the deceased, but is not attested ; and it makes a very different disposition of the property from that contained in the will.

The deceased's property consisted of personalty

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Evidence of handwriting alone not sufficient to establish a testamentary paper.

A codicil propounded upon such evidence without any facts or ceremonies connecting it with the deceased, pronounced against with costs.

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of the value of about 30,000*l.*, and of real estate of about 3,000*l.* By his will of May, 1832, he devised his real estate to trustees, to be sold for the benefit of the families of his two nieces; and also gave 14,000*l.* in the same way. He then gave a variety of specific legacies to the amount of between 4,000*l.* and 5,000*l.* to different friends, and the residue equally between Captain Bussell and Dr. Terry; and of this will he appointed Captain Bussell and Dr. Shillito executors. Amongst the legacies there is one of 500*l.* to his brother, Mr. Roger Pettiward, and another of 1,000*l.* to his nephew, Charles Eyre, both of whom predeceased him, the latter dying in the early part of the year 1833, the former on 31st July, in the same year. He had also one other nephew, Mr. George Eyre, who died in the year 1832. By his will he had also left a legacy of 300*l.* to the Suffolk Hospital, which by the codicil of June, 1833, he increased to 600*l.*; and he also bequeathed 100*l.* to the Suffolk Clerical Society; in other respects he confirmed his will.

Shortly after his death, one part of his will and codicil, for it was executed in duplicate, was found at his residence, at One House, in an envelope, on which was endorsed "a counterpart at Dyke's, Doctors' Commons," where, accordingly, the other part was found: these were the only testamentary papers known at that time to be in existence; although, it seems, the deceased had executed two former wills; one in, or before the year 1824, in which he also executed a codicil to it, as appears by the evidence of Mr. Foss, and a will and codicil bearing date in 1828 and 1829; but the contents of neither of these are before the Court.

It further appears, that Dr. Shillito, one of the

executors of the will of 1832, from conversations which he had had with the deceased in the month of August, 1833, was strongly impressed with the notion that there were other testamentary papers of the deceased, besides the existing will and codicil ; and that they contained dispositions in favor of himself, or of his family ; accordingly he set about making inquiries of the friends of the deceased, both orally and by letter, as to the fact of the deceased having left any testamentary papers in their possession ; and, amongst others, he addressed himself to the Rev. Henry Marriott, who had been the deceased's curate ; and also to Mr. Robert Marriott, a solicitor, at Stowmarket ; the deceased having, as Dr. Shillito states in his deposition, in the conversation of the 25th August, 1833, observed to him, after alluding to his will being with Mr. Dyke, " Marriot will also have some papers," and this impression of Dr. Shillito may probably have occasioned the delay in proving the will and codicil, which has been alluded to in argument, as it was not probable that the executors, of which he was one, would take probate while this impression remained. These inquiries, however, produced no result until the 17th January, 1834, when, as pleaded, Mr. Robert Marriott received a letter, bearing the London post mark, to the following effect : " Inclosed is a paper left (with the strictest injunctions to secrecy) by the late Rev. D. Pettward, nearly the last time he was in London, with directions to be sent by post after he should have been dead a month at least."—London : January, 1834. Enclosed in this letter was the paper containing the codicil now propounded, and which was written upon part of a sheet of paper, on which

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was a note purporting to have been written by deceased, and addressed to Mr. Robert Marriott, Stowmarket, requesting his acceptance of something what does not appear. This note was dated Wednesday; but no month, or year, was added. The contents of the codicil are to this effect: "I give to J. G. Rust, Esq. five hundred pounds; also to Henry Marriott five hundred pounds; also to my servant twenty pounds; also I forgive Mr. Robert Marriott the debt he owes to me at my decease, and name him one of the executors of my will, and one of my residuary legatees; and I confirm my will in other respects, and desire this may be considered as a codicil thereto. Witness my hand the 14th day of May, 1833. Daniel Pettiward." Now, this paper so produced purports to give considerable benefit to these persons; and to depart very materially from the disposition of the property by the will. Now, the letter was anonymous; and neither the writer of the codicil, nor the writer of the letter, with whom the codicil is said to have been deposited, have, up to this moment, thought proper to come forward. Immediately on the receipt of this letter, Mr. Marriott, who must have been greatly surprised at receiving it, exerted himself in endeavouring to obtain evidence of the handwriting of the deceased; and having furnished himself with affidavits from a considerable number of persons acquainted with the deceased, he communicated the codicil, together with the evidence which he had collected in its favour, to Capt. Bussell and Dr. Shillito, in the hopes, as it should seem, that they would be satisfied with the evidence arising from these affidavits, and consent to prove it with the will, and other codicil, though it could hardly be

expected that they would act upon evidence so obtained, considering the very extraordinary manner in which the paper came to light. The consequence of this communication was, that a decree was taken out by Captain Bussell, calling upon Mr. Marriott to propound the paper, which he has accordingly done.

Under the peculiar circumstances of the case, there being no attesting witness to the codicil, and no person discovered who was supposed to be the depository of it, a very special allegation was given in on the part of Mr. Marriott; and twenty-three or twenty-four witnesses have been examined in support of it. A counter allegation has been given by Captain Bussell, either contradicting or explaining many parts of Mr. Marriott's plea, upon which seventeen or eighteen witnesses have been examined.

Now, the factum of the codicil depends entirely upon the evidence of handwriting, which it is admitted is not alone sufficient to enable the Court to pronounce for any testamentary paper, but there must be some circumstances adminicular to that evidence tending to connect the paper with the alleged testator, the requisite stringency of those circumstances varying according to the strength of the evidence as to handwriting; but still it is admitted that evidence of handwriting, done however strong, is not sufficient proof of the factum of the instrument, and accordingly circumstances are pleaded, showing the eccentricity which marked the conduct of the deceased; the state of his regard for the persons mentioned in the codicil; and above all, the declaration which he has stated to have made to Dr. Shillito: that, "Marriott would have some papers," which, it is contended, could have reference to no other paper than that propounded.

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Tidd v. Atkinson
1 Ad. 212
Rushford M. A. 21
21 H. 224

Miching v.
See however, Wood v.
Goulden. J.C. 1840
2 Moore 443.

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As might be expected, the great stand has been made to establish the handwriting of the deceased ; and, it is said, that stronger evidence has been produced in this than in any other case which has come before the Court, and that it is such as to amount almost to a moral certainty ; and besides, that there is one circumstance which distinguishes this case from all others, namely, that the note which occupies one side of the paper on which the codicil is written was originally admitted, and has not been counterpleaded, to be in the handwriting of the deceased, and, therefore, that the paper is connected with the deceased. But in my mind, this goes a very little way to remove the difficulty, for it nowhere appears when this note was written ; it is not admitted that it was written to Mr. Robert Marriott at all, for it is denied that the superscription is in deceased's handwriting, even if the body of the note is, and there is therefore not much to be collected from this circumstance : the connection of the paper with the deceased must be deduced from other circumstances. But it is again argued, that the codicil bears intrinsic evidence of having been written at, or about the same time with the note, and with the same pen and ink, as there are signs of failure of the ink in both instruments ; but it has been objected in answer to this, that they could not have been written on the same day, as the 14th May, the date of the codicil, was on a Tuesday, whilst the note is dated on Wednesday, and certainly there is no want of ink in the signature to the codicil. The paper also appears to have been opened at least once after it had been sealed, and to have been again sealed ; and in its appearance it is much more dilapidated than, from the supposed time of

its having been written, might have been expected. No evidence is, I think, given, as to the state of the paper when first it came into the possession of Mr. Marriott, on the 17th January; but it is possible, that its present condition may have been occasioned by the hands of the numerous persons to whom it has been produced. Passing therefore by these, which may be considered as preliminary observations, I will now proceed to the more important part of the case; namely, the evidence produced in support of the instrument. And first, as to the handwriting, which it is not the intention of the Court to enter into with any great degree of minuteness, as the circumstances of the case do not appear to require it. The facts which are pleaded to be in the handwriting of the deceased, are, the names of the legatees—the subscription to the codicil—and the whole of the note, with its subscription and superscription. Now, there are certainly a great number of witnesses, respectable in station and character, and well acquainted with the deceased, who have deposed, in very strong terms, as to their belief of the parts pleaded being the genuine handwriting of the deceased; and although some of them speak with less confidence, with respect to some parts than to others, it cannot be denied, that a very strong body of affirmative evidence has been produced; whilst, on the other hand, it must be admitted that there are other persons of respectability also, and well acquainted with the deceased, and his writing, who are of a different opinion, and whose evidence cannot be altogether laid aside in the consideration of the case, particularly under the circumstances connected with it. Now, in all cases the negative evidence to handwriting must be of

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less weight than the affirmative, for reasons that must be obvious to every one, and which have been over and over again stated in these Courts, in those cases to which the Court may think it necessary to advert very briefly.

I will however first observe, that if the Court were called upon to decide simply and abstractedly from all other circumstances upon which side the weight of evidence was, it would probably feel itself compelled to pronounce for the affirmative side of the question—but this fortunately is not the duty of the Court; it must take into its consideration all the circumstances of probability or improbability, in order to determine its judgment, for the very nature of the evidence is such, as to be altogether most unsatisfactory and inconclusive, and such as it is admitted the Court cannot act upon alone.

With reference to this part of the case, it may not be unimportant to look at some of the decisions in which this question has been discussed, and to see to what extent the Court has acted upon this principle, which it is admitted to be the rule of the Court. In the case of Machin and Tyndall against Grinden and others, (a) Sir George Lee said, “ I pronounced against the codicil, because it was not supported by any circumstance whatever; on the contrary, the circumstance (which he stated) gave suspicion of forgery.” Now, the Court does not cite this case for the purpose of showing the similarity of its circumstances to this—but for the principle which it establishes. Sir George Lee goes on to observe : “ but supposing there were no suspicions

(a) Lee's cases, vol. ii. p. 406.

“ at all of any indirect practice, I was of opinion
 “ there was not evidence enough before the Court
 “ to establish this paper, for it stood solely upon a
 “ doubtful proof of handwriting—the most uncer-
 “ tain species of proof. The Court has never es-
 “ tablished a paper, not found in the deceased per-
 “ son’s custody, nor supported by any circumstance,
 “ upon a controverted evidence of handwriting;
 “ and in this case the evidence, that it was not Mr.
 “ Pickering’s (the deceased) handwriting, is as
 “ strong as the evidence that it was ;” and accord-
 “ ingly the codicil was pronounced against.

The same doctrine has been held by the late learned judge of this Court. In the case of Saph against Atkinson, (a) he said: “ Evidence as to hand-
 “ writing, either affirmative or negative, is com-
 “ monly inconclusive for obvious reasons; the for-
 “ mer, from the exactness with which handwriting
 “ may be imitated; the latter, from the dissimi-
 “ larity which is often discoverable in the hand-
 “ writing of the same person, under different cir-
 “ cumstances.” And further on he observed: “ The
 “ rule here rather inclines to hold that a will cannot
 “ be proved by mere evidence to the handwriting,
 “ without some concomitant circumstances as to
 “ the place of finding, or the like, to connect it with
 “ the party whose suggested will it is.” Again,
 “ All evidence of handwriting is the mere state-
 “ ment of an opinion formed by the witness on
 “ comparing a writing said to be by the deceased
 “ with some standard—either by having seen him
 “ write a longer or shorter time from the transac-
 “ tion—or by comparing the paper with the ad-
 “ mitted writing by deceased.”

(a) 1 Add. p. 213.

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It was stated in the argument, that comparison of handwriting was not admitted in other Courts. In these Courts such evidence has always been admitted. In the case before adverted to, (a) Sir George Lee admitted evidence of that description, and said that “such had always been received.”

In *Robson v. Locke* (b) the Court observed: “That evidence to handwriting is, at best, but inconclusive—but of that species of proof I will say, that the witnesses here produced have furnished as strong, and as satisfactory a sample as well could be furnished.” So that even when the proof was so strong the Court considered it still inconclusive, although in that case it was in support of the evidence of a witness, who swore to the fact of execution. He further observed: “The rule of this Court is, that evidence to handwriting only is incapable of substantiating any disputed instrument as a will.” Again, the same learned judge, in the case of *Constable v. Steibel*, (c) made these remarks: “This evidence then is, if evidence of handwriting can be, of considerable weight. But the inclination, amounting almost to a settled principle of this Court—founded perhaps on the facility with which handwriting may be imitated—has been not to pronounce for a disputed paper on proof of handwriting alone, but to require some corroborating circumstances. These are peculiarly necessary in the present case, where there is much conflicting evidence on this point: for there are a great number of witnesses also well acquainted with the handwriting of the deceased, who speak to their belief that the paper is a for-

(a) Lee's Cases, vol. ii. p. 335. (b) 2 Add. 53. (c) 1 Hagg. 60.

“ gery, being in their opinion unlike his (the tes-
 “ tator’s) ordinary character. These witnesses are
 “ not to be laid entirely out of consideration ; but
 “ I never can think that evidence of dissimilitude
 “ is equally cogent and weighty with evidence of
 “ similitude.” For reasons which he then assigns,
 arising from the particular state of the deceased at
 the time, and other circumstances—and he con-
 tinued : “ If I were bound to form an opinion whe-
 “ ther this paper is in the handwriting of the de-
 “ ceased, I would say that the evidence in favor of
 “ it so far preponderates, that I should be disposed
 “ to pronounce the codicil genuine.”

The Court then went into the history of the find-
 ing of the paper, and was ultimately of opinion that
 it was entitled to probate.

But the case of Crisp and Ryder against Wal-
 pole, (a) which was referred to in the argument, is still
 more applicable in its circumstances to the present
 case, though the paper was not produced until after a
 much longer time after the death of the deceased.
 He died on the 12th November, 1826 ; and the pa-
 per propounded was not brought forward till 1828
 —having been, as alleged, sent to Mr. Ryder in an
 anonymous letter of the 19th May of that year.
 The Court, without hearing counsel against the co-
 dicil, observed : “ This case lies within a narrow
 “ compass ; for unless the principles established in
 “ these Courts, for the security of property, are bro-
 “ ken through, I can entertain no doubt what deci-
 “ sion ought to be given.”

He then stated the particulars of the case, and pro-
 ceeded : “ The true question in the cause is, whether
 “ there be proof that the instrument is a genuine

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(a) 2 Hagg. 531.

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“ codicil—the act of the deceased.(a) To this paper
“ there is no attesting witness ; the factum depends
“ upon evidence of handwriting alone ; and there
“ is no circumstance that connects the instrument
“ directly with the deceased. Some general regard
“ for the several legatees has been relied upon, as
“ rendering the disposition probable. Now, in the
“ first place, no person would set about the fabri-
“ cation of an instrument, without endeavouring
“ to give the disposition some colour of probability :
“ but looking to all the circumstances in which the
“ deceased stood, with reference to these parties at
“ the date of this instrument, it does not appear to
“ my mind even probable, that he would have be-
“ queathed these two legacies to Mr. Crisp and
“ Mr. Ryder.

“ It is a rule of this Court, that evidence of
“ handwriting alone is not sufficient to establish
“ a testamentary paper, without something to con-
“ nect the act with the deceased : and this rule is
“ founded upon the facility there is of imitating
“ handwriting so closely, as to deceive those who
“ are best acquainted with that of the supposed tes-
“ tator. It is therefore required that there should
“ be something to connect the instrument with the
“ deceased—either that it was found in his reposi-
“ tories at his death, or some direct recognition of
“ it in his lifetime ; or else some other circumstances
“ of such strong probability that it was the genuine
“ act of the deceased, as to leave no reasonable
“ doubt on the moral conviction of the Court.

“ In the present case, the evidence of the simili-
“ tude of handwriting, even produced by the par-
“ ties setting up the paper, is not uniform in support

(a) 2 Hagg. 534.

“ of it, while it is opposed by the evidence of other
“ individuals who believe it not to be the hand-
“ writing of the deceased : so that this proof, at
“ the best of a loose and unsatisfactory species, is in
“ the present instance conflicting.”

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The Court then proceeded to state that there were other circumstances unfavorable to the genuineness of the instrument, which he stated : “ But,” said the Court, “ the great difficulty of the case
“ arises from the mysterious appearance of this in-
“ strument a year and a half after the testator’s
“ death : nor is there any account from whom it came,
“ or from whence it came, or where it was first dis-
“ covered, or why it had lain so long concealed :
“ no plausible conjecture can be formed in expla-
“ nation ; and this circumstance raises a strong
“ suspicion that the instrument has been a fabrica-
“ tion of much more recent date than the death of
“ the testator. In addition to this, the paper is
“ dated at the head, *Denston Hall, September*
“ *2nd*, 1823, which was the testator’s usual place
“ of residence.”

But it was proved that the deceased was not at that time there resident—which the Court remarked upon as affording an additional circumstance of suspicion. “ Upon the whole,” the Court said, “ the judgment of the Court is, that there is
“ a complete failure of proof of this instrument as
“ a codicil of the deceased testator : the Court is
“ not called upon to pronounce that it is a fabrica-
“ tion ; but, whether fabricated or not, I must
“ repeat that I fully acquit Mr. Ryder of any
“ participation in the transaction, and that I enter-
“ tain no suspicion that he was concerned in, or
“ privy to, the fabrication of the paper.” Again,

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“ If, however, parties will set up, and undertake to establish such a case by proof, for the chance of benefit to themselves, they must also be content to do it, at their own risk of paying the costs in case of failure. I must therefore, not only pronounce against the codicil, but feel bound to condemn the parties who have pounded it in costs.”

Considering then the rule, as indeed has been fully admitted, to be clearly established; that evidence of handwriting is not sufficient to establish a testamentary instrument, but that there must be something to connect it with the deceased; and admitting the preponderance of the evidence as to handwriting to be in favour of the genuineness of the paper; it would seem to be a waste of time to enter into a minute consideration of it; the Court will therefore proceed to consider whether the circumstances which are stated to connect the paper with the deceased are sufficient to produce that result.

Now it was first contended, that the will itself was not duly considered, that it was drawn up and executed in a hurry, and, therefore, that it was not improbable that the deceased would alter it; but the Court cannot discover any marks of haste, or want of due deliberation, either in giving the instructions for it, or in its preparation.

The judge then referred to Mr. Dyke's evidence, who deposed to the first article: “ I became slightly acquainted with the deceased in this cause by his being present on a few occasions which I am unable to specify, when his nephew, George Eyre, has called on me in Doctors' Commons. Upon the death of his nephew, the deceased, as one of his executors, attended at my office and

proved the will; that was in the month of March, 1832, and I saw the deceased several times on the business. In the course of it he employed me to prepare a will for him, and in the following year a codicil to it of both of which I will more particularly depose, I never observed anything singular or eccentric about the deceased, or evincing any disposition to create surprise, so far as I saw of the deceased I should rather have said that he was inclined to be reserved and distant, those which I have mentioned are the only transactions of business I ever had with the deceased. In proving the will of his said nephew, the deceased showed himself very particular, and evinced every disposition to be correct, and throughout the whole business, as well as in every thing relating to the preparation of his own will and codicil, conducted himself in a most steady and becoming manner.

To the the second article: "In the years 1832 and 1833, about the time the instruments respectively bear date, I was employed by the deceased to make his last will and testament and codicil thereto mentioned, as articulate in the third and ninth articles of the allegation given in, and admitted in this cause on behalf of Robert Marriott the other party therein. In giving instructions for both of those instruments, which he did to myself personally, the deceased was very particular and exact, and both of them were, by his particular directions, prepared and executed in duplicate. Previously to his giving instructions for his said will, the deceased when with me, on one occasion, on business respecting the affairs of his deceased nephew, George Eyre, inquired of me if I ever made wills, and also, as I have already mentioned,

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what my charge would be for so doing, and in a day or two afterwards he called upon me and brought with him instructions in writing, and also, as I best recollect, a former will which he had made, I read over the instructions with him which, so far as I recollect, were perfectly regular, but what was afterwards done with them, or whether they are still in existence, I do not know. From these instructions, and some verbal explanations I received from the deceased, I prepared the draft of a will, being the script A. * * * *

In a day or two afterwards the deceased attended at my office when the draft-will was read over with him and finally settled, and very shortly afterwards I attended with the will and duplicate at the lodgings of the deceased in Suffolk Street by appointment, and both parts were there executed by the deceased, one part he retained in his own possession, and the other by his desire I took possession of and kept. At the time the deceased first spoke to me about making a will for him, he mentioned, I remember, as a reason for wishing so to do, that he had ascertained that on account of the death of their elder nephew, George Eyre, his (the deceased) brother, had substituted their other nephew, Charles Eyre, as his heir, and, therefore, that he himself should provide for or take care of his nieces, or to that effect.

To the third article: "On the 6th of June in the following year, 1833, as I know from such being the date of the codicil just deposed to, the deceased called at my office, and told me that he wished to have a codicil made to the will I had made for him, or that he wished to make some alteration in his said will; he at the same time

produced to me the part of his said will which as predeposed he had retained in his own possession, and reminded me that I had the duplicate of it, which, by his desire, I produced to him. He then requested me to read it, which I did very deliberately, he, at the same time looking over the duplicate which he had brought with him. In the course of my reading the will, when I came to the name of Dr. Terry, which was left in blank as to the Christian name, the deceased reminded me that William was Dr. Terry's Christian name, and thereupon I inserted that name with a pencil in the blank in that part of the will which I was reading; some conversation which I do not very distinctly recollect passed between the deceased and me as to the legacy given by the will to the deceased's nephew, Charles Eyre, who as I knew was then recently dead, as to the mode in which it should be disposed of, and the name of Mrs. Charles Eyre, his widow, was mentioned, and some observations made about her which I am unable to recollect, but arising probably upon some suggestion made by myself that part of the legacy should be given to her; but whatever the conversation was, I remember that the deceased seemed satisfied upon learning from me, on inquiry, that if the legacy were not noticed it would form part of the residue of his property, and he declined having anything mentioned in respect to that legacy, it seemed as if it were a weight off his mind that he could omit noticing it in any way. Upon my coming to the legacy of three hundred pounds given by the will to the Suffolk Hospital, the deceased said he wished it to have six hundred

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pounds. I asked him if he wished that sum to be in addition to the former legacy, but he said no, that he wished the legacy to be six hundred pounds in all; the deceased appeared to think that the will might be altered in that respect, but I told him it might be done by a very short codicil. He then said that he wished to give a legacy of one hundred pounds to a clerical charity in Suffolk, he was in doubt how the charity was described, but after some consideration he at length fixed on "the Suffolk Clerical Charity" as being a sufficient description of it. He then inquired how long I should be preparing such a codicil for him, and having learned from me that it would not take long, he said he was going further and would call again in a couple of hours to execute it. The deceased then went away, leaving both parts of his will with me for the purpose of having the proposed codicil written upon each of them. He was particularly desirous, I remember, that the codicil should be written on each of the parts of his will, and that it should be executed in duplicate, that was his own proposal. I then proceeded to draw up a sketch of the proposed codicil, which was copied in my office at the end of each part of the will, and upon the return of the deceased, one part of the codicil was read over to the deceased by myself, he at the same time looking at and comparing the duplicate himself as I read. The deceased then executed each part of the codicil in the presence of myself and two of my clerks, and the two parts of the will and codicil on each were enclosed, to the best of my recollection, in the same envelopes in which they had been before enclosed, and one part was

taken away by the deceased, the other was left with me and remained in my possession until after the deceased's death. Neither on the said occasion of my reading the will over to the deceased, nor upon his giving instructions for the said codicil, nor at any other time did the deceased mention, or in any way allude to any other codicil or testamentary disposition having been made by him, since the will I had as predesposed made for him, or intended to be made by him."

Nothing can be more natural than the disposition of the property, and nothing more proper and careful than the manner in which the instructions are given and acted upon; it is executed in duplicate; one part is taken possession of by the deceased himself, and the other left with Mr. Dyke, and an indorsement is written on the envelope, in which the part which the deceased had was kept, that the other part was at Mr. Dyke's. I cannot, therefore, agree in the observation, that it was probable that the deceased would alter this will; at all events he adheres to it for twelve months, and I think there is also quite sufficient evidence to justify the disposition in favour of the husbands of his nieces, with whom, though he did not keep up any very constant intercourse, on account of the distance at which they resided from each other, yet it is admitted he entertained for them much respect and esteem, though it is said not much friendship and regard.

The next ground of probability urged is, that he had great regard and esteem for the legatees in the codicil propounded; now when the evidence comes to be examined, to what does it amount? why that

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Mr. Rust was an intimate friend of the deceased, to whom it was not improbable he might have left a legacy, and that Mr. Henry Marriott had been his curate for a short time; that the deceased had a high opinion of him, and entertained a regard for him; so that it was not improbable he might have also left some legacy to him.

But great stress is laid upon the regard and esteem, he is said to have felt for Mr. Robert Marriott, to whom it was contended that he lay under such infinite obligation as called upon him to make some return, he never having paid him anything for his services in his life time. Now that the deceased was in the habit of going to Mr. Marriott's to consult him as to the execution of deeds and powers of attorney, and of availing himself of his legal knowledge in reading deeds for him, there can be no doubt; and no one would have been surprised if the deceased had left him a hundred or two, or three hundred pounds; but that these services coupled with the connexion between their families should have rendered it probable that the deceased should leave him between five and six thousand pounds, and make him an executor of his will, is a proposition to which the Court cannot in any manner assent. It is indeed said that the deceased was under obligation to Mr. Marriott for consenting to retain a sum of 1300*l.* which had been borrowed of him by the father of Mr. Marriott, who was desirous of paying it off; but that, at the deceased's desire, he consented to have a transfer of the debt to him, for which he paid interest. The only witness examined to this point is Mr. J. Marriott, who mentions the arrange-

ment, but does not give the particulars of it; but supposing the circumstances to be precisely as are represented in the plea, they do not in my mind lay any foundation of probability for the extent of the benefit which this codicil purports to confer upon Mr. Robert Marriott.

Again, it is said that the deceased's eccentricities were such as to render his conduct with respect to this paper, most probable, and, indeed, that two of the witnesses, Mrs. Pettiward and Mrs. Garnham, depose to the impression which they entertained, the latter stating that "the act bespoke the man." But the question is not as to their impression, but what impression the evidence is calculated to produce in the mind of the Court.

Now, that the deceased's conduct was singular, and eccentric, in many particulars cannot be denied; it is spoken to by all the witnesses; but in what instance did it show itself? in surprising his friends, by appearing in a Chinese dress; introducing a blind fidler; receiving his friends with a salute of guns, and hoisting a flag; in dropping halfpence down the backs of the children at school, or putting a bun into their hands, or amusing himself with giving them bread dipped in cream, and laughing at the cream dropping from their mouths; in short, that he was a man fond of practical jokes, and was amused with trifles; but that he ever suffered these fancies to intrude into matters of business, is altogether in opposition to the whole of the evidence; for instance, see Mr. Foss's account of the manner in which he conducted himself in the preparation and execution of the codicil of 1824, and the will of 1828, and the codicil of 1829.

See also the account given by Mr. Dyke already

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referred to ; where nobody could have conducted himself with greater steadiness and propriety ; and that such was his conduct in all matters of business is deposed to by Hart, Packington, and Mrs. Roberts, in answer to the second interrogatory.

So far, therefore, from the general habits of the deceased rendering it probable that he should have adopted this method of conferring a benefit on his friends, the very reverse seems to be established ; for no reason can be assigned why he should act with respect to this instrument in a different manner to what he had done with respect to his will and codicil.

I consider, therefore, that this ground of probability also fails.

Then comes the main fact of all—his conversation with Dr. Shillito on the 25th August, 1833. Now, giving Dr. Shillito credit for a perfect recollection of the deceased's expression upon that occasion, and for an accurate account of it, to what does it amount ? “Marriott also will have some papers.” Can anything be more loose and indefinite ? Is there anything to connect it with this paper ? It is said, indeed, to what else could it allude ? But this seems to be begging the whole question ; it is assuming, that the instrument is proved to be the act of the deceased himself : whereas that is the point to be proved.

Now, certainly Dr. Shillito did not suppose the deceased referred to such a paper as this ; he expected one in favor of himself and his family, and all his inquiries are made under that impression ; his conduct shows that he had no very definite understanding of deceased's meaning ; He was entirely in the dark, as to which of the Marriott's deceased

alluded ; and it is clear that no further explanation took place in September, when Dr. Shillito was at One House: surely then it is too much to contend that this conversation must necessarily have reference to such a paper as this, to be produced under such extraordinary circumstances.

A good deal of observation has been made on an expression in one of Dr. Shillito's letters, as if he was impressed with the notion that the paper was not to be produced till some time after the deceased's death, by his direction ; and it was said, that this consists with the expression in the letter transmitting the codicil. Now, this letter was not written till some time after Dr. Shillito's, and it might have been suggested by that very observation, but the Court is unwilling to enter into any conjecture upon the subject ; at all events it is not proved that deceased gave any instructions to the effect recited, or that he had anything to do with the writer, the coincidence therefore between Dr. Shillito's notions and the expressions in the letter, can have no effect whatsoever. To what the deceased might allude, the Court is not bound to conjecture : it is sufficient that there is no proof that he referred to this document, or any of a similar description.

The Court is unable, and the counsel have been unable to suggest any probable reason for the non-appearance of the writer of the codicil, or of the letter, with whom it is said the codicil was deposited, under strong injunctions of secrecy, and not to produce it for a month after the death of the deceased. For what possible reason could this be ? Was his character such as to lead the Court to suppose that he wished to involve his executors and their families in difficulties ? or that he wished to

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raise hopes and expectations for the purpose of disappointing them? The very reverse seems to have been the case on those occasions in which he is said to have been fond of surprising his friends, his aim appearing to have been to give them pleasure; and such was the impression on the mind of Mr. Marriott, who seems to have forgotten, that in proportion to the agreeable surprise which he would feel on finding himself thus unexpectedly benefitted, would be the disappointment of Captain Bussell and Dr. Terry, at finding so large a portion of the deceased's property conferred upon another.

Upon the whole, then, of this case, I am decidedly of opinion that there are no circumstances of probability, nor declarations, nor facts, to connect this instrument with the deceased; and although the preponderance of evidence upon the abstract question of handwriting may be in favor of the party propounding it, yet it is by no means conclusive even upon that point; and taking all the circumstances into consideration, I feel myself bound to pronounce that the parties have failed in proving this instrument to be the genuine act of the testator, and I therefore pronounce against it.

Costs have been pressed against Mr. Robert Marriott, as well upon the general principle as on account of the manner in which the suit has been conducted. On the latter ground, I should be unwilling to give costs, for he was under the necessity of pleading every thing that might make in favor of the genuineness of the paper, when once he had made up his mind to propound it. But upon the general principle I feel greater difficulty, for I see no reason why Mr. Marriott should be allowed to make this experiment for his own advan-

tage, at the expense of Captain Bussell and Dr. Terry; they have been kept out of the probate of the will for twelve months and have been put to considerable expense in defending themselves against the effect of a codicil produced under these very extraordinary circumstances, and I do not see how I can refuse to condemn Mr. Marriott in costs if they are pressed against him. But I confess it would be a relief to my mind if costs were waived, as I feel very strongly impressed with the belief, I may say conviction, that if this paper is a fabrication, Mr. Marriott is entirely free from any participation in it.

The other party having pressed for costs, the Court decreed them against Mr. Marriott.

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CONSISTORY COURT OF LONDON.

THE OFFICE OF THE JUDGE PROMOTED BY CHICK
against RAMSDALE AND CHICK, *falsely called*
RAMSDALE.

1835.

Feb. 20th.

Criminal suit
for incest; mar-
riage of the
parties an-
nulled, and pe-
nance enjoined.

Penance after-
wards remitted.

THIS was a criminal proceeding instituted by Ann Chick against Matthias Ramsdale, and Joan Chick, the sister of his former wife, for incest. The citation called upon the parties to answer to a suit “touching their souls’ health, &c., and more especially for their having been guilty of the foul “crime of incest.”

The *King’s Advocate* and *Nicholl*, for the Promoter, prayed the Court to assign the parties to perform the usual penance, and also to pronounce the marriage null and void.

Addams on behalf of the parties proceeded against, contended that it was not competent to the Court to pronounce a sentence annulling the marriage—that the parties were called upon by the citation to answer merely to a suit for incest—that nothing was said therein of annulling the marriage of the parties—that to ingraft upon such a citation a sentence of nullity of marriage, bastardizing the issue, was tantamount to permitting the party to proceed in a civil suit, without the necessary proof of interest.

JUDGMENT.

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DR. LUSHINGTON.

April 28th.

In this case the office of the judge was promoted by Ann Chick *against* Matthias Ramsdale, and Joan

Chick on the ground of incest, alleged to have been committed by them. The incest consisted in Ramsdale having married Joan, the sister of his former wife. The evidence as to this is so clear, that it is unnecessary for me to advert to it, but I delayed giving judgment in this case, in consequence of doubts I entertained of the propriety of pronouncing a sentence annulling the marriage of the parties.

The citation called upon the parties to answer to a suit touching their souls' health, and more especially for being guilty of the crime of incest, and the sentence which I am asked to sign declares the marriage of the parties to be null and void. In consequence of the doubts I felt upon this point, I directed a search to be made for precedents, and I am now informed that in the case of Blackmore and Thorp *against* Brider, (a) in the Arches, on 10th of April, 1816, the citation was similar to that in the present case, and that the marriage was annulled; and that in the case of Cleaver *v.* Woodridge, (b) Arches, 1789, the citation was the same, and the sentence which cannot be found would seem to have been the same also; as there is no proof that these cases were determined without sufficient consideration, although I still entertain some doubts upon this point, I must consider them as precedents binding on this court; I therefore pronounce this marriage null and void, and direct the parties to perform the usual penance.

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On a subsequent day, (6th of May) *Addams* prayed the Court to remit the penance directed in

(a) 2 Phill. 359.

(b) 2 Phill. 362, *note*.

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this case; he founded his application upon a certificate and affidavit of Dr. Taylor, the medical attendant of the parties, that “Matthias Ramsdale
 “had been attacked in March last with a brain
 “fever, and that he had been in an unsound state
 “of mind in consequence, and that in his (Dr.
 “Taylor’s) opinion very disastrous consequences
 “might result from his performing the prescribed
 “penance.”

“That Joan Chick has a morbid state of her
 “uterine system, that in February last she had a
 “premature labour (induced by the state of her
 “mind) attended by dangerous hemorrhage, from
 “the effects of which she is not yet recovered, and
 “that she is now again pregnant, that any excitement will be calculated to induce miscarriage
 “and uterine hemorrhage, and that she would be
 “exposed to dangerous risk if the penance be
 “carried into effect.”

And he cited the case of *Burgess against Burgess*. (a)

The *King’s Advocate* did not object to a suspension of the penance, but submitted that sufficient cause was not shown for its remission.

DR. LUSHINGTON.

The Court in this case pronounced its usual sentence, that the parties should do the ordinary penance, and I did so, because it appeared to me that it was a matter of form, and that it was not competent for the Court, but upon special circumstances, to depart from the usual form.

I accede to the remarks of Lord Stowell in *Burgess against Burgess*.

(a) Consist. Rep. 384, 393.

Whatever may have been the reasons for the performance of penance in former days, certainly they do not apply with equal force to the present time. The facts stated in the certificate and affidavit of Dr. Taylor, render it the imperative duty of the Court not to enforce this part of its sentence, at least at the present time.

As this statement is uncontradicted, I must presume that it is an accurate representation of the circumstances of the parties, and undoubtedly if it be true, it becomes the duty of the Court not to expose the parties to the hazard which Dr. Taylor says would be likely to be incurred; for this part of the sentence was not intended as anything more than a public recantation of the offence of which the parties have been guilty; I have no hesitation, therefore, in saying, that the Court would not attempt to enforce the penance against either of the parties at present; but I am bound to consider whether I ought to suspend the sentence merely, or dispense with it altogether.

The learned counsel for the promoter has expressed his ready concurrence in the suspension of the penance; but in my judgment, considering the state of both parties, by allowing the threat of penance to hang over their heads for an indefinite time—for the extent of time for which the penance is to be suspended it is impossible to tell—the probable consequences would be almost as detrimental as the actual performance of it. I therefore think it right and fitting to remit the penance.

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The *King's Advocate* and *Haggard*, in support of the sentence.

Addams contra.

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EASTER TERM,
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Suit of nullity of marriage under 4 G. 4, c. 76, by reason of undue publication of banns sustained; both parties having "knowingly and wilfully intermarried after such undue publication."

JUDGMENT.

SIR HERBERT JENNER.

This is an appeal from the Consistory Court of London in a suit of nullity of marriage, by reason of undue publication of banns brought by the father of a minor, Edward Croxall Tongue against Mary Anne Allen, widow, falsely calling herself Tongue.

The citation was returned on the 22nd of April, 1834, the libel was brought in on the 16th of May, and admitted without opposition on the first session of Trinity Term, the 29th of May, 1834. The marriage was confessed, and a negative issue was given to other parts of the libel, five witnesses were examined, no interrogatories were put to the witnesses, nor was any counterplea given in, so that the case came on to be heard on the evidence taken on the libel only, when the judge of the Consistory Court was of opinion that the proof was insufficient, and dismissed the party cited.

From this sentence an appeal was brought to this Court, and an allegation containing supple-

mental matter was offered, which was opposed and rejected by the Court, so that the appeal has been heard upon the same evidence as in the Court below.

The facts of the case appear to be these. The minor (the son of Edward Tongue, who is described as a gentleman of considerable landed property, on which he resided in Staffordshire) was born on the 4th of May, 1815, and was baptised on the 15th of October following, as Edward Croxall Tongue; in 1828 or 1829, he was placed at a school kept by a gentleman of the name of Atchison, at Edgbaston near Birmingham, in Warwickshire; in 1832, Mr. Atchison removed from Edgbaston to Keynsham, in the county of Gloucester; and in January, 1833, a second son of Mr. Tongue's was sent to the same school. It further appears that Mrs. Allen, the sister of Mr. Atchison, who was about thirty-five years of age, and a widow, lived with her brother at Edgbaston and Keynsham as housekeeper, and to superintend the pupils, that the young man was always, as well at home as at school, called by the name of Croxall, the baptismal name, Edward, having become entirely dormant and disused, although it certainly does appear that he had been seen to write the name Edward, but whether with or without the name, Croxall, is not stated, but the general effect of the whole evidence is, that he was called, addressed, and spoken of, by his family, friends, and schoolfellows, and by Mrs. Allen as Croxall only: and so much had that become the name, by which he was known, that one witness says that if he had heard Edward Tongue mentioned he should have supposed the father was meant.

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In the beginning of 1833, the parties having agreed to be married, banns of marriage were published on Sunday, the 10th of February, and on the two following Sundays in the church of St. Michael, Bristol, in the names of Edward Tongue, and Mary Anne Allen, altogether omitting the name Croxall, by which, as has been already observed, the young man was generally, if not universally known; and it is charged that this was knowingly and wilfully done, and by preconcert between the parties for the purpose of fraudulent concealment.

In pursuance of the banns so published, the marriage was celebrated on the 26th of February, in the church of St. Michael.

After the marriage the parties returned to Keynsham, where the minor continued as a pupil of Mr. Atchison's until the Midsummer vacation, when he went home unaccompanied by Mrs. Allen; at the end of the vacation he returned to school, and at Christmas again went home; none of his family at such time having the least suspicion of the connexion between him and Mrs. Allen: during these holidays, however, some circumstances came to the knowledge of the father which induced him to make inquiry, when he was for the first time informed of the marriage of his son, whom he immediately sent abroad; and the parties have had no further intercourse together.

Proceedings were shortly afterwards instituted for the purpose of having the marriage declared null and void; such is the general outline of the case as collected from the history given by the witnesses, and, which, as there is no dispute as to the main facts it is not necessary to detail more minutely.

The result then is this, that at the marriage the minor was between seventeen and eighteen years of age; the woman thirty-four or thirty-five, and a widow, or representing herself as such, and the sister of the master of the school where he was placed; that the marriage was clandestine, and continued secret and unknown to the family of the minor, for nearly twelve months; that the name of baptism, by which alone he was generally known, was omitted in the publication of the banns; and that this was done for the purpose of concealment, and in fraud of the father's rights, there can be no doubt.

The question, therefore is, whether a marriage under such circumstances is good and valid according to the existing marriage law of this country; for under the original marriage act, the 26 Geo. 2, c. 33, the marriage would have been clearly void, it having been repeatedly held that the omission of the name of general repute in the publication of banns, when for the purpose of fraud rendered the marriage void, as in the case of *Pouget v. Tomkins*, (a) in which Lord Stowell observed, that all parts of a baptismal name ought to be set forth, as composing altogether the name and legal description of the party, yet he would not go the length of deciding that in all cases the omission of a name would be fatal, where no fraud was intended, nor, any deception practised, and where the suppression was only of a dormant name.

The present statute, the 4 Geo. 4, c. 76, equally requires the true names of both parties to be published, but in order to obviate the inconveniences,

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(a) 2 Consist. Rep. p 142.

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and to prevent the crying injustice which arose out of the law as it formerly stood, and the cruel injuries to which innocent parties were exposed, it has provided, that in order to annul a marriage on the ground of the banns having been unduly published, “ the parties must have knowingly and “ wilfully intermarried without due publication of “ banns ;” the construction which has been put upon the twenty-second section of the 4 Geo. 4, c. 76, in the few cases as yet determined under it, is that both parties must be cognizant of the undue publication. This indeed seems to arise necessarily from the words of the act itself; the “ parties” are spoken of in the plural number, and there would have been no necessity for any enactment at all upon the subject, if the knowledge of one party would have been sufficient to render the marriage void, as there can hardly be a case in which one of the parties must not be cognizant of the fact.

But, however, this may be, the same construction has been put upon this section of the act in the courts of common law as in these courts: the cases have been referred to in the argument and the Court will notice them hereafter, at present it will be enough to say that it entirely agrees in the soundness of that construction; and it only remains to be seen whether there is sufficient proof in the present case to justify the Court in coming to the conclusion, that both parties were cognizant of the undue publication of banns, before the marriage was solemnized; for I also agree with the decisions before adverted to, that the knowledge must be shown to have existed before, and not after the marriage. The manner in which this knowledge is to be proved must vary according to the circum-

stances of each case, *that* may be quite sufficient in one which would not suffice in another, and although it may be true that in construing the law, the favourable or unfavourable nature of the transaction in question ought not to be taken into consideration, yet circumstances may give a greater or less effect to the evidence of the facts to which the law is to be applied, and may furnish a clue to guide the Court to the proper conclusion to be drawn from them. It cannot be required that in every case direct and positive proof should be adduced; if so, I am inclined to agree with the observation of Dr. Addams, that in most cases the fraud would be successful, the parties would have nothing to do but to keep their own secret. The Court must therefore take all the circumstances into consideration, and deduce its conclusion from them. It was indeed hardly denied that circumstantial evidence would be sufficient, but it was said, it must be such as to leave no reasonable doubt on the mind of the Court. It is necessary then to consider what the circumstances are.

In all cases of this kind, three questions necessarily arise :—

First, Whether a marriage has been had between the parties to the suit.

Secondly, Whether there has been an undue publication of banns.

Thirdly, Whether both parties were cognizant of the undue publication before the marriage was celebrated.

Now here there can be no doubt of the fact of marriage between these parties, nor of their identity.

Secondly, There can be no doubt from what has

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been observed, that there was an undue publication of banns, it would be a waste of time to inquire further on this point; and it is equally clear that concealment was the object of both parties. The third point, whether both parties were cognizant of the undue publication, remains to be considered. Now that Mrs. Allen knew cannot be denied, she in fact, although it is otherwise pleaded in the libel, gave the instructions for the publication of the banns: it was said that the evidence as to this fact was irregularly introduced, and perhaps it was so, but if it were not true, it might have been contradicted even after publication, but no attempt of that kind was made either here or in the Court below; I must therefore take that fact as proved. There is certainly no direct proof of concert between the parties, but there is a pretty strong presumption of it; both were living in the same house, having daily communication with each other; both must have known of the necessity for concealment, and neither could well have been ignorant of the means to be used from the very nature of the transaction; but it does not rest here, the proceedings at the time of the marriage are material; it is sworn that it is the practice in this parish to show the banns-book to both parties, and to inquire whether they are correctly described or not, and Sarah Haynes, the sextoness, says, "she is sure it was done on the present occasion." Now was the fact so or not? The witness deposes positively to the practice, and that it was observed on this occasion; if the fact were not so, it might have been counterpleaded, and the minister and clerk might have been brought to contradict the sextoness; there is no reason to believe that she deposes falsely,

and there can be no reason assigned why the usual practice should not have been adhered to at this marriage. Again, during the ceremony the minor must have answered to the name of Edward, and there is no evidence to show that he evinced any surprise at being so addressed. And after the ceremony was concluded, he signed that name to the entry in the register without hesitation. This latter circumstance standing alone might not perhaps have been sufficient to fix him with a knowledge of the undue publication of banns, but taken in conjunction with all the other circumstances it goes a considerable way to satisfy me of his previous knowledge of the intended fraud.

These facts then taken altogether form a strong body of evidence upon which the Court, had this been the first case arising under the statute, might, and would, have felt itself justified in pronouncing this marriage to be void, as having been knowingly and wilfully by both parties contracted without due publication of banns.

But cases have been referred to, which the Court must now proceed to consider, in order to see whether they at all interfere with the impression it has stated itself to entertain as to the effect of the evidence here produced.

The first, that of *Wiltshire against Prince*, in the Consistory Court of London, (a) was a suit brought by the father of a minor, for the purpose of setting aside the marriage of his son with a woman servant in the family; wrong names had been used in the publication of the banns, and there was clear proof that both parties knew it, and that it was for the

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(a) 3 Hagg. Ecc. Rep. p. 332.

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purpose of fraud : there was no doubt of the fact of both parties being cognizant of the undue publication of banns before the marriage, and the Court accordingly pronounced it void ; that case therefore is important only as showing the construction put upon the words of the Act of Parliament, by the learned judge of that Court, namely, that *both* parties must be cognizant of the undue publication of banns : nothing was there determined as to the nature of the proof required.

The second case cited, was that of the King against the Inhabitants of Wroxton, (*a*) which was a question sent by the Quarter Sessions for the opinion of the Court of King's Bench. The facts were found by the justices, and the Court was bound by them ; on what evidence the justices came to the conclusion of fact does not appear ; but they stated, that the woman was ignorant of the false publication, although the names used were very different from the true names.

The decision of the King's Bench on the facts found by the justices was, that as the woman did not know of the false publication of banns the marriage was good ; in fact it goes no further than to adopt and confirm the construction which had been put upon the statute in the case of *Wiltshire v. Prince*. These cases, therefore, prove nothing more than that in order to render a marriage null and void, by reason of undue publication of banns, both parties must be shown to have been cognizant of the undue publication before the celebration of the marriage.

But the case more particularly relied upon as

(*a*) 4 Barn. & Ad. 640.

applicable to the case now before the Court, was that of *Hadley v. Reynolds*, which occurred in this Court, but has not yet been reported. The circumstances of that case were extremely different from the present; there the husband, after a cohabitation for three years, and a half and the birth of a child, sought to set aside his own marriage, he himself having caused the banns to be published;—it was so pleaded by him. He was a clergyman of twenty-six or twenty-seven years of age, the woman twenty-two, both were therefore at full liberty to contract marriage: no rights of third parties were invaded. The woman having no occasion to have recourse to fraudulent concealment, nor having any reason to suppose that fraud was to be resorted to; there was no evidence to show that she was at all acquainted with the intended use of false names; the banns were published at Birmingham, she was at Worcester; there was not any ground to presume that there was any previous knowledge on her part of the undue publication; true it is that she answered, during the ceremony, to the wrong name, and also after the marriage, signed that name in the register; those were the only circumstances from which her knowledge could be inferred, and the Court rightly holding, that in such a case, the strictest proof was necessary, was of opinion that those circumstances alone were not sufficient evidence of the fact.

But what is the present case? A woman, situated as I have described, persuades, for so I must presume, a boy not half so old as herself, to marry her; she knowing that he had a father who would disapprove of the marriage, gives instructions for the publication of the banns, omitting that which must be

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 EASTER TERM,
 MAY 7th,
 3rd Session.

 TONGUE
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 ALLEN.

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 EASTER TERM,
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 v.
 ALLAN.

considered as the only real baptismal name of the minor, and this for the purpose of fraud, the parties being in constant and daily communication with each other; they proceed to Bristol on the morning of the marriage, and return to school the same day, when they resume their usual occupations, she superintending her brother's pupils, he continuing his education; no one of his schoolfellows nor any one else suspecting that any connexion existed between them. It is precisely the case against which the legislature must have intended to provide—the maxim, *semper præsumitur pro matrimonio*, strongly applies to Hadley's case, but not to this, where fraud was meditated by both parties, and in which it may not unjustly be presumed, that both were acquainted with the means by which that fraud was to be carried into effect.

On the whole, I cannot bring my mind to doubt, that both parties knowingly and wilfully intermarried without due publication of banns, and I therefore pronounce for the appeal, retain the principal cause, and declare this marriage to be null and void.

The sentence of the Arches Court in this case was affirmed on appeal by the Judicial Committee of the Privy Council, on the 21st of June, 1836.

Present—The Rt. Hon. Sir L. SHADWELL, V. C.
 Mr. Justice BOSANQUET,
 Baron PARKE,
 THOS. ERSKINE, C. J., of the
 Court of Bankruptcy.

CONSISTORY COURT OF LONDON.

WRIGHT v. ELWOOD, FALSELY CALLING HERSELF

1835.

Clowes v Clowes. Wright. Archd. Ct. Nov-2. 1842

TRINITY TERM,
June 23rd,
3rd Session.

THIS was a cause of nullity of marriage by reason of undue publication of banns, promoted by James Dennis Wright *against* Amelia Elwood, heretofore calling herself Emma, otherwise Emily Wright, and pretending to be the wife of the said James Dennis Wright.

Marriage without due publication of banns, not void under stat. 4 G. 4, c. 26, s. 22, where only *one* of the parties knew of the false publication.

The libel pleaded:—

First, That Harlow Elwood and Amelia Elwood, then Amelia Dames, were married on the 22nd of October, 1821, at a private house, in the parish of Straid, in the county of Mayo, in Ireland, by the Rev. Anthony Thomas Clerk, a minister in Holy Orders of the United Church of England, by virtue of a license first had, and that an entry was made of such marriage in the parish register.

Second, That by the law of Ireland, a marriage by a clergyman of the United Church of England and Ireland, in a private house is valid.

Third, That the register book of marriages, for Straid, for that year is lost.

Fourth, Cohabitation until in or about 1823, when Amelia Elwood separated from her said husband.

Fifth, That at the end of the year, 1825, Amelia Elwood assumed the Christian name of Emma,

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and gave out and pretended that she was a spinster. That James Dennis Wright, bachelor, believing that the said Amelia Elwood, so assuming the name of Emma, was then a spinster and free from all matrimonial contracts and engagements, made his courtship and addresses by way of marriage to her, and that she consented to be married to him, that he caused banns of marriage between himself and the said Amelia Elwood, (then the wife of the said Harlow Elwood), by the name of Emma Elwood, spinster, to be published in the parish church of St. John the Evangelist, Westminster, on Sunday, 28th of May, Sunday, 4th of June, and on Sunday, 11th of June, 1826, and that they were married on the *6th of July*, 1826.

Sixth, Pleaded the entry of the marriage.

Seventh, That at the several times of publication of the banns, the said Harlow Elwood, the husband of the said Amelia Elwood, was living; and that he died on the *27th of June*, 1826, at Ballymore in Ireland.

Eighth, Pleaded the identity of the wife.

Ninth, That the parties cohabited together as husband and wife until September, 1828, when the said J. D. Wright having discovered, that he had been imposed upon by said Amelia Elwood, inasmuch as she was the wife of the said Harlow Elwood at the time of the publication of the banns, he separated himself from her.

Addams in opposition to the libel contended:—

First, That there was no undue publication of banns—that the names Amelia and Emma were the same, or, at least, that there was not such a variation of names as would render the banns void, especially as it was not pleaded in the usual way,

that Amelia was the baptismal name of the party, and her usual and proper name.

Secondly, That supposing the publication of banns was an undue publication, still that the marriage was a valid one, as by the present marriage act both parties must be conusant of the undue publication; whereas it is pleaded in this libel that the husband believed that the wife was a spinster at the time of the publication.

Phillimore and *Haggard* in support, contended, that by the marriage law, independent of the Acts of Parliament, no marriage could be celebrated without publication of banns or dispensation.

That the party being a married woman at the time could not authorize the publication of banns, that the banns must be taken to be a nullity, and consequently the marriage also must be null and void.

JUDGMENT.

DR. LUSHINGTON.

The libel in this case pleads, that Harlow and Amelia Elwood were married in a private house in Ireland, in October, 1821 (now that must be taken to be a valid marriage).

It then pleads, that James Dennis Wright caused banns of marriage to be published between himself and Emma Elwood, spinster, on the 28th of May, 4th of June, and 11th of June, 1826, and it alleges that she was properly Amelia Elwood, the wife of Harlow Elwood, that he was living after the publication of banns, and that he died before the celebration of the marriage, 6th of July, 1826; and the question is whether or not such marriage can be pronounced null and void.

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Now the first objection to this libel is, that the variation of the names is not such as would render the publication of banns an undue publication; but assuming, at present, that the publication was such as to cause a sufficient disguise of the parties, the most essential fact is, that at the period of publication, Mr. Wright supposed that Mrs. Elwood was a spinster, it, therefore, cannot be said that this was a false publication of banns had with the consent and connivance of *both* parties.

Under the present marriage act, 4 Geo. 4, c. 76, there is no nullity, except under the 22nd section, which enacts, “ that if any person shall knowingly
“ and wilfully intermarry in any other place than
“ a church, or such public chapel, wherein banns
“ may be lawfully published, unless by special
“ licence, or shall knowingly and wilfully inter-
“ marry without due publication of banns or li-
“ cence, from a person or persons having authority
“ to grant the same, first had and obtained, or shall
“ knowingly and willingly consent to or acquiesce
“ in the solemnization of such marriage by any
“ person not being in Holy Orders, the marriages
“ of such persons shall be null and void to all
“ intents and purposes whatsoever.” The first consideration then is, whether this is such a marriage as comes within any of these provisions, and I am of opinion that it is not.

The construction put upon this clause is the same in this as in other courts, although there may be a difference of opinion as to the evidence which may be required.

But it was pressed upon the Court, that independently of the statute, this is a nullity by the general marriage law of England.

Now the act commences with repealing all other acts previously in force, and I must look to the provisions of this statute and nothing else.

Before the 26 Geo. 2, c. 33, the first statute on the subject; this would clearly have been a good marriage. A marriage in a church would undoubtedly have been as valid without banns or licence as with, for although they were requisites fit and proper to be complied with, yet they were not necessary to the validity of the marriage.

The only conclusion that I should come to would be that this was a valid marriage, and I therefore reject the libel.

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THE OFFICE OF THE JUDGE PROMOTED BY WILLIAMS
v. BROWN.

Addams for Mr. Williams.

Haggard, contra.

JUDGMENT.

DR. LUSHINGTON.

In this case, the office of the judge has been promoted by the Rev. Mr. Williams, the incumbent of the parish of Hendon *against* the Rev. Mr. Brown; and the object of the suit, as I understand, is, to ascertain in this form, whether Mr. Brown has been officiating in the parish of Hendon under a competent authority or not. Although the form of the suit is a criminal one, I apprehend that all that is sought to be determined, upon the facts

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TRINITY TERM,
June 30th,
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The right of nominating to a chapel under the stat. 1 & 2 W. 4, c. 38, cannot be acquired, unless the conditions required by the act be strictly complied with.

The conditions required, are conditions precedent.

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before the Court, is, the rights of the respective parties. Undoubtedly the question to be decided is of very considerable importance, and I have deemed it my duty to give it very serious consideration, and to endeavour, if possible, on a consideration of the Act of Parliament, to find out its true construction, with reference to the facts and circumstances proved in evidence. Before I proceed minutely to consider the facts and the law, I think it right to make an observation upon the jurisdiction of the Court in this case. When the suit was originally instituted, I certainly entertained some doubt how far it was competent for this Court to exercise jurisdiction to the fullest extent to which the case might be carried. But on reference to authorities—the cases of “*Bliss against Woods*,” (a) of “*The Duke of Portland against Bingham*,” (b) of “*Carr against Marsh*,” (c) of “*Moysey against Hilcoat*,” (d) especially with reference to the first. I could entertain no doubt that this Court had jurisdiction and the power of expressing its opinion upon the question. But I will state candidly the difficulty which presented itself to my mind, which was this:—In the course of the discussion it might, perhaps, incidentally happen that I should be trying the right to a perpetual curacy, and there was a doubt in my mind, whether the Court was competent to come to a decision upon this point; or, at least, whether it would not have been open to either party to have applied for a prohibition, if the Court proceeded. However the authorities which I have mentioned, of cases in these Courts, and which have not been

(a) 3 Hagg. 486.

(b) 1 Consist. Rep. 157.

(c) 2 Phill. 198.

(d) 2 Hagg. 30.

in the slightest degree impugned—no prohibition having been applied for—are sufficient to warrant me in considering the circumstances of this case.

It appears that the chapel in question was built by the late Mr. Wilberforce, and was consecrated a few days after his death, and it purports to have been built under the statute of 1 and 2 W. 4, c. 38. No doubt can be entertained as to the general principle of the law, where any clergyman attempts to officiate in a church or chapel within the limits of a parish, without the permission of the incumbent. That has been laid down in the case of "*Bliss against Woods*," by *Sir John Nicholl*, precisely as was laid down by his learned predecessors and all authorities; namely, that it is not competent for any clergyman of the church of England to enter a parish without leave of the incumbent, and to officiate in performing the duties of his vocation. The defence on the part of Mr. Brown is, that this case is brought within an exception to the general principle of the law, and it is alleged, that under the provisions of the act, 1 and 2 W. 4, it was competent to Mr. Wilberforce to erect this chapel with the consent of the incumbent or patron, and after sufficient endowment and compliance with the various provisions of the statute, to obtain the right of nominating the minister, who might be duly licensed by the Ordinary of the Diocese; and that a license has been obtained. It is unnecessary to consider one part of the case; namely, whether there was a performance of Divine Service before a license was obtained; because that was not a question in the citation as originally taken out in the cause, and is not applicable to the

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important point; namely the various rights of the parties.

The question shortly comes to this: have the provisions of the statute been complied with or not?

And if they have not, the next question is, what are the legal consequences to be deduced therefrom?

The provisions of the statute, to which the facts of the case have reference, are contained in the second section of the statute itself; and I must take the Act of Parliament as my guide, and endeavour, as far as it is in my power to arrive at a just construction of it, with reference to the facts and circumstances which have been proved in the cause. If I am of opinion that the conditions of the statute have not been complied with, I shall have then further to consider, whether these conditions are precedent or not; because if they are conditions precedent to the right of nomination vesting, and it appears that those conditions have not been carried into effect, the right of nomination will never have vested at all, and consequently any license which may have been granted on a supposition that such conditions had been complied with, and that the right of nomination had vested, falls to the ground. The sole ground upon which the ordinary grants a license is, that the right of nomination has vested in the person who has nominated the individual who comes so to be licensed. It must not be understood that where a party has obtained the authority of the ordinary, that authority is conclusive. It is not competent for the ordinary himself without consent of the incumbent, to license any person to officiate within the limits of the

parish of that incumbent. It is not necessary to travel through the whole of the provisions of the Act of Parliament; but I shall first consider the objections, and whether they are supported by the evidence in the cause.

The objections resolve themselves into four heads:—

The first objection is, that, at the date of the passing of the act, the chapel was not built and completed within the terms of one of the subsequent sections of the act.

The second objection is, that the repairing-fund is not sufficient.

The third is, that the free-seats are not of sufficient extent according to the directions of the statute.

The fourth is, that the nomination has not been rightly exercised.

With respect to the first point, I have looked through the whole of the evidence with reference to the question, whether the chapel was built and completed at the date of the passing of the act, according to the true meaning of the legislature; and after the best consideration, I can give to the evidence, I have come to the conclusion, that the Act of Parliament has been on this point sufficiently complied with. The next question is one of the greatest difficulty in the case; and for the purpose of determining this question, I must first refer to the terms of the Act of Parliament itself. The Act of Parliament directs that “where any person or persons, belonging to the church of England, shall declare his, her, or their intention of building a church or chapel for the performance of Divine service, [as aforesaid,] and where such per-

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TRINITY TERM,
June 26th,
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BROWN.

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TRINITY TERM,
June 30th,
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“ son or persons shall declare their intention of
 “ providing a sum of one thousand pounds at the
 “ least by way of endowment for such church or
 “ chapel to be secured upon lands or money in the
 “ funds, in addition to the pew-rents and profits
 “ arising from the said church or chapel in case
 “ any such rents shall be taken, and shall also
 “ declare his, her, or their intention of providing a
 “ fund for the repairs of the said church or chapel,
 “ in manner following ; namely, one sum equal in
 “ amount to five pounds upon every one hundred
 “ pounds of the original cost of erecting and fitting
 “ up, or of purchasing such chapel or building, to
 “ be secured upon lands or money in the funds, as
 “ aforesaid ; and also a further sum to be reserved
 “ annually out of the pew-rents of the said church
 “ or chapel, after the rate of five pounds for every
 “ one hundred pounds of the sum so to be pro-
 “ vided, as last aforesaid.” Now after having
 looked through the evidence, I think it unneces-
 sary to refer to it in detail, but I shall advert to
 such parts of it as bear upon the point I have to de-
 termine,—whether or not a repairing-fund “ equal
 “ in amount to five pounds for every one hundred
 “ pounds of the original cost of erecting and fitting
 “ up”—the chapel has been set a part.

The evidence on this part of the case consists of
 the testimony of Mr. Ravenscroft, and Mr. Philip
 Flood Page. I have read this evidence in order
 to see whether it established the sufficiency of the
 repair-fund, and I must say that looking to this
 evidence, and to the defect of it, I think it is a
 most unsatisfactory mode of establishing so im-
 portant a fact. Nothing could have been more
 easy than to have produced to the Court a state-

ment of the actual sum expended in the erection and fitting up of this chapel, and it would have been competent for the party defendant in this cause to have stated the component items of the account, out of which the sum of five pounds per cent. ought to be assessed. Instead of that, I have the evidence of Mr. William Ravenscroft, the solicitor, acting in the lifetime of the late Mr. Wilberforce, who gives the following account of the transaction. He knows knowing of his own knowledge as to the cost of erecting and fitting up the chapel: he was informed by another person the amount upon which the five per cent. was to be calculated upon. His evidence is this: he states that he applied to Mr. Samuel Flood Page, the architect, who told him that the amount was 3,600*l.*, and that he inserted that sum in the deed of endowment, and the sum of 180*l.* as the amount of five per cent. on that principal sum. Every part of the testimony of this witness tends to show that in his judgment there was a perfect *bona fides*; that it was intended that the act should be accurately complied with, and that all that was requisite and necessary was to be done. In his answer to the fourth interrogatory, he goes on to say, that he cannot swear either one way or the other; so that no information is obtained from this witness.

The next witness is Mr. Philip Flood Page, and he is the brother of the architect who was employed on the occasion, and he knows nothing of the cost of erecting the chapel, except so far as he is enabled to speak from the papers in his office, and except so far as he considers himself competent, without reference to the actual cost and expenditure under the Act of Parliament, to make an estimate of the

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sum. This witness was not the architect, but his brother was; and his brother has not been called upon to give evidence. He is now in the Isle of Man, having left the business and gone into the church, and it might be attended with some inconvenience to examine him. But if the party in the cause did not think it right or expedient to examine the brother, some better account might surely have been given of the costs and expense of building this chapel. The account which this gentleman gives, appears to me singular. I presume Mr. Ravenscroft gave him some information as to the principle of the estimate required. He, however, states: "The sum I gave to Mr. Ravenscroft
" to insert in the deed of endowment as the cost
" of erecting and fitting up the chapel in question
" was 3,600*l*. I gave him that as a round sum."
The Act of Parliament does not speak of a round sum at all. The Act of Parliament directs that there shall be set apart five per cent. upon "the
" original cost of erecting and fitting up." This was not for the purpose of selling the chapel. The act speaks elsewhere of the purchase of such chapel; but where the right of patronage is assigned to the builder and endower of a chapel, it is made a condition that five per cent. of the actual prime cost of erecting and fitting up shall be set apart as a repair fund. "I gave that as a round sum, for my
" calculation made it amount to only 3,325*l*. 18*s*. 8*d*.
" I had no communication with Mr. Wilberforce on
" the subject; the application to me and my answer
" to it, so far as I know, were quite unknown to
" Mr. Wilberforce. I made my calculation in this
" manner, I took the sums paid to Messrs. Bowden and Mr. Cantellow, who had the contract

“for building the chapel; 3,080*l.* 2*s.* 3*d.* paid to
 “Messrs. Bowden, and 560*l.* 16*s.* 10*d.* paid to Mr.
 “Cantellow, making 3,640*l.* 19*s.* 1*d.*,” this ex-
 ceeds the amount given to Mr. Ravenscroft by
 40*l.* 19*s.* 1*d.* “Then I deducted from that the
 “duties upon the building materials, 221*l.* 3*s.* 4*d.*”

Now really it is necessary to direct our attention to this item, for I am bound to see whether the Act of Parliament has been carried into full effect. I listened to the argument of counsel for Mr. Brown, to endeavour to learn on what principle this deduction was justified. I am aware that under other church-building acts, duties were allowed to be remitted, but I am not aware that where a church or chapel has been built under this act, there is authority given by any Act of Parliament for a remission of any part of the duty. But I should like to know whether the duty has *de facto* been remitted. For whether it was or was not remitted,—it is a matter of serious consideration for the Court, considering how the question presses on the party, whether the fact of the duty being remitted and repaid ought not to have been pleaded and proved in order to be made a fit subject for consideration: Because, how is it possible for me to decide whether this sum of 221*l.* 3*s.* 4*d.* is a legal deduction from 3,630*l.* 19*s.* 1*d.* if no statement is made to me of the authority under which the deduction is made, and when it is not averred that there has been any remission at all? I apprehend I am under the necessity of coming to the conclusion that the item of 221*l.* 3*s.* 4*d.* forms a part of the original cost of erecting and fitting up this chapel, and that it is not fit to be deducted. This gentleman goes on, “I did not deduct the salary and expenses of

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“ the clerk of the works, nor the cost of the iron-
 “ railing, or of the hot-air stove, nor the fee of
 “ the architect, nor the painted window-guard,
 “ nor the advertisements; for those items were
 “ not included in the gross sum. I did not add
 “ them in my calculation of the gross cost of the
 “ chapel. Then I deducted, besides, the duty
 “ on the building materials, being part of the
 “ extras paid to Messrs. Bowden; 36*l.* 8*s.* 8*d.* for
 “ the brickwork to the iron railing; 29*l.* 4*s.* 4*d.*
 “ for the brickwork to the hot-air stove; 1*l.* 14*s.*
 “ for rough oak extra height of fence; 9*l.* for in-
 “ closing the chapel during the winter of 1829-30,
 “ and 17*l.* 10*s.* for an additional coat of paint ren-
 “ dered necessary from the chapel having been
 “ finished in 1830, and not consecrated till 1833.
 “ The sum of 39*l.* paid for the painted window, I
 “ did not add. Of the whole sum of 3,080*l.* 2*s.* 3*d.*
 “ paid to Messrs. Bowden, 357*l.* 2*s.* 3*d.* were extras;
 “ in which were included the items I have speci-
 “ fied.” Now this witness to the fourth interroga-
 tory, says, “ I have no doubt that the erecting and
 “ fitting up of the chapel in question actually cost
 “ the late Mr. Wilberforce more than 3,600*l.*” Now
 I have looked as minutely as I can into the various
 items, and to the principles of calculation which
 this gentleman proceeded on, to see whether accord-
 ing to any calculation I can make in conformity to
 the statute, I am able to reduce the amount of the
 actual cost of erecting and fitting up of the chapel
 to 3,600*l.*; and I have done so with reference to
 the statement of this witness that the cost was only
 3,225*l.*

Mr. Wilberforce (and it is a fact which is mainly
 relied upon by Mr. Williams,) in the month of

April, 1831, was desirous of disposing of the chapel at Mill Hill to the patron of the parish, on the principle of a simple re-imbusement to himself of the cost of the chapel and security for the same; and it appears from a letter from the secretary to the church commissioners, to the address of Mr. Williams, that a statement had been made by Mr. Wilberforce of the cost of the chapel, which statement is annexed to the letter, and is to the following effect:—“ Cost of Mr. Wilberforce’s chapel, “ at Mill Hill, as nearly as can just now be ascertained. Account of Messrs. Bowden, the contractor, (it is doubtful whether or not 90*l.* of this “ amount still remains to be paid) 3,080*l.* 2*s.* 3*d.* “ Clerk of the works and other incidental expenses, “ 177*l.* 7*s.* 1*d.* Account of Messrs. Cantelow, “ plasterer, 560*l.* 16*s.* 10*d.* Mr. Smalley iron “ railing, 80*l.* Hot-air stove, 56*l.* Architect, &c., “ 170*l.* Painted window-guard, advertisements, &c. “ &c., 12*l.* 4*s.* Altar window fittings (I am not “ clear of the particulars of this amount), 39*l.* 12*s.* 6*d.*” The whole is 4176*l.* 2*s.* 8*d.* Then there are blanks for “ furniture and fittings,” and for “ law charges.” It is then added:—“ I am told that it is expected “ there are to be more payments amounting from “ 350*l.* to 400*l.*, or even 500*l.* additional. It is “ expected there will be a repayment of the amount “ of duties paid on bricks to the amount perhaps of “ 100*l.*; but these particulars may be supplied “ hereafter, if the general negociation proceeds.” Now I have not the least information before me of a date subsequent to that of this paper, as to whether any of these anticipated payments were made, or whether or not Mr. Wilberforce calculated upon the items stated here; and I cannot but think that

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it was incumbent on the party whose duty it was to make it appear that 3600*l.* was the whole amount of the cost of erecting and fitting up this chapel, to show that the sum actually paid by Mr. Wilberforce on account of the chapel did not exceed that sum ; or, at least, to show what was paid, and why some of the items should be considered as extras, and not to be included. I am also without any evidence as to what Mr. Wilberforce meant by other payments to the amount of 350*l.*, 400*l.*, and even 500*l.* more. Looking to the items in this statement, as they are before me, they amount to 4176*l.* Which of these items, consistently with the Act of Parliament, should I be justified in rejecting ? “ Clerk of the works and other incidental “ expenses.” The words of the statute are, “ the “ original cost of erecting and fitting up.” I can only understand, unless the word “ cost” has received by law some different interpretation, that its meaning is, the actual cost incurred by the individual for erecting and fitting up the chapel ; and I am of opinion that one of these expenses must be that of the clerk of the works. But if I entertained any doubts upon this point, what am I to say to “ other incidental expenses ?” What other expenses ? And how are they to be excluded from the calculation ? Then there is “ architect, &c. “ 170*l.*” I am at a loss to understand why that should be excluded, or that for the hot-air stove. The window guard, being ornamental, might perhaps be excluded. But it appears to me that, if it be contended that any of these items are not fairly included in the calculation, the party is bound to point out what items, and on what principle they are to be excluded. I confess that the only

attempt which has been made to do so, has been wholly unsatisfactory to my mind, although I acknowledge I have the strongest predisposition to come to an opposite conclusion, if the law would allow me. Because, when I see what has been the extent of the expenditure by Mr. Wilberforce, and the great advantage to the public which has been afforded by the erection of this chapel, in the parish of Hendon, I feel disposed, to the utmost extent to which the law allowed me, to sustain the right of nomination. But I am bound to put the real construction upon the Act of Parliament, whatever may be the consequences to the party; for I am aware of nothing more injurious than to attempt to fit the limits of an Act of Parliament to the circumstances of a particular case. I am compelled, therefore, to conclude, that the Act of Parliament has not been complied with, according to the terms of it.

Then what are the effects? The Act of Parliament goes on to say; “It shall be lawful for the
 “bishop of the diocese, in which such parish or
 “extra parochial place is locally situate, if he shall
 “see fit, and he is hereby authorized, to declare by
 “writing under his hand and seal, that the right
 “of nominating a minister to such church or chapel
 “when so built or purchased, and endowed, as
 “aforesaid, and when the conditions herein-before
 “mentioned shall have been performed, shall for
 “ever thereafter be in the person so building, or
 “purchasing, and endowing the same, his, her, or
 “their heirs and assigns.” Then did the right of nomination vest, or was it forfeited? I apprehend it is as clear as words can express it, that the per-

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formance of the conditions, is a condition precedent to the vesting of the right of nomination.

In this view of the case, I am compelled to come to the next step, and to conclude that the right of nomination never vested in Mr. Wilberforce; and if so, it follows that the license which was granted under a supposition that the right of nomination did so vest, cannot be supported. Now the result which I have assumed leads me directly to the conclusion, according to my view of the case, that Mr. Brown is not at present legally entitled to perform the duty of a clergyman within the limits of the parish of Hendon. Two other objections remain to be disposed of; one is, that the room assigned for free seats is not sufficient. Looking to the whole of the evidence in the case, it appears to me that this objection could not be sustained. The total dimensions of the chapel are 609 feet, of which 252 feet are assigned to free seats: so that there appears to be sufficient to satisfy the requisites of the act. But an objection has been taken, that part of the free seats are in the gallery, and that the gallery is appropriated to the children of the national school. Now I have looked into all the measurements of the architects, and into the different modes of estimate, and I think I may take it thus; that two children occupy the room of one grown person. I am of opinion with reference to this mode, that sufficient room for free seats has been set apart in the chapel; and I am very clearly of opinion that it is a sufficient fulfilment of the Act of Parliament, to set apart a space which shall include the accommodation for children; for I can never go the length of saying, that under this Act

of Parliament, the whole of the accommodation as free seats must be for adult persons. The children of the poor are as much entitled as grown up persons to have accommodation for attending Divine Service, and I consider this objection not supported. The Court has then only to consider the remaining objection as to the mode in which the nomination was made. I am of opinion that I am not called upon to consider that question. I think if the right of nomination had vested in Mr. Wilberforce, it would not have been necessary for me to consider, whether the form of the nomination had been precisely consistent with regularity or not. This is not the substantial question before the Court.

Looking at all the circumstances of the case, I am compelled to come to the conclusion, that as far as I am enabled to form a judgment of the true construction of the Act of Parliament, and of the evidence, the provisions of the act have not been complied with; that a compliance with the provisions of the act is a condition precedent to the vesting of the right of nomination, and that the right not having vested, the license granted under a supposition that the right had vested cannot be supported.

I wish it to be distinctly understood that I impute no blame to any of the parties whatever, I have no doubt of the *bona fides*, and of the intention of all to fulfil the terms of the Act of Parliament; but I must say that it is most unfortunate, that where the conditions of an Act of Parliament are so clear and explicit, and where a reference to the Act of Parliament might have enabled the individuals to have understood its directions and conditions, and to have complied with them lite-

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rally, instead of that, reference was made not to the architect of the chapel, but to another individual who could give no information to the other party, who had no knowledge of the circumstances; and that a computation should have been made, not with reference to the actual cost of the building and fitting up of the chapel, the only criterion prescribed by the Act of Parliament. On these grounds I am under the necessity of coming to the conclusion that the articles have been proved. It is clear that this is a case in which I should not think of giving costs on either side.

ARCHES COURT OF CANTERBURY.

WYNN *v.* DAVIES AND WEEVER.

The *King's Advocate* and *Phillimore* for the appellant.

Lushington and *Addams* contra.

JUDGMENT.

SIR HERBERT JENNER.

This is an appeal from the sentence of the chancellor of the diocese of Hereford, admitting certain articles in a cause of office promoted by Davies and Weever, the churchwardens of the parish of St. Nicholas, Hereford, *against* the Rev. Thomas Wynn, clerk, for publishing the banns of marriage between persons not being parishioners or resident in that parish, and for marrying such persons; also for not distributing the alms collected at the offertory in pious and charitable uses pursuant to the Rubric in the Book of Common Prayer.

The citation was dated the 2nd of August, 1834, and was returned into Court on the 7th of August.

On the same day an appearance was given for the party cited, and the articles were brought in. On the 23rd of September, a prayer was made by the proctor of the promoter to amend certain of the articles, which was permitted by consent; and on

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a clergyman,
for publishing
banns of mar-
riage between
persons not pa-
rishioners of, nor
resident in his
parish; and for
marrying such
persons, ad-
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the 30th of October, the admissibility of the articles was debated. The Court took time to deliberate; and on the 14th of November, the proctor of the promoter prayed leave to strike out parts of other articles; and on the 11th of December, 1834, the chancellor admitted the articles.

From this decree an appeal was prosecuted, and the case has been very fully argued. The question raised being one of very great importance, both as respects the public interest, and the parochial clergy of this country, and the individual more immediately concerned in the proceedings, and not having, as far as I am able to learn, been as yet judicially determined, the Court thought it right to take some time to consider of the judgment which it ought to deliver, as well as to look into those cases which were cited on one side and on the other; and this, with other unavoidable causes, occurring in the earlier stages of the hearing, have postponed the decision of this case to a later period than was desirable. I have thought it right to say thus much in explanation of the delay that has taken place, that no blame attach to the parties, or the petitioners. I now proceed to the question before the Court.

The principal offence charged, I have already stated to be, that of publishing the banns of marriage, and of marrying persons not resident within the parish, and the objection taken to the admissibility of the articles, is, that the offence imputed to the appellant, if a violation of the law is not cognizable in the Ecclesiastical Courts; and a doubt is raised, whether in fact it ever was cognizable in those Courts; or if so, whether the jurisdiction has not been taken away by subsequent statutes.

Now that the performance of religious rites and ceremonies was under the superintendence and direction of the ordinary, to whose authority the clergy were amenable, is too clear to admit of dispute, and it would be a waste of time to refer to any authorities in support of this position; in fact, the correction of the clergy in matters relating to the performance of Divine Worship, is, and always has been, more peculiarly the province of the ordinary.

That the canon law prohibited clandestine marriages, and inflicted punishment on the parties contracting such marriages, as well as on the minister solemnizing them is abundantly clear; and it is no less certain, that marriages were forbidden to be solemnized by any other than the priest of the parish in which the parties resided; unless with the license of the diocesan and of the curate of the parish. It would hardly have been necessary to cite passages from the canon law in support of this latter doctrine, but for the doubt which was suggested in the argument; but as that doubt has been raised, the Court is called upon to refer to some of the authorities in order to establish this position.

The constitution of Archbishop Reynolds is as follows: (a)—“*In matrimonio quoque contrahendo*
 “ *semper tribus diebus dominicis vel festivis a se*
 “ *distantibus, (b) quasi tribus edictis, perquirant*
 “ *sacerdotes a populo de immunitate sponsi et*
 “ *sponsæ. Si quis autem sacerdos hujusmodi edicta*
 “ *non servaverit, pœnam nuper in concilio super*
 “ *hoc statutam non evadat.*”

(a) Lyndwood, book 4, tit. 1, De Sponsalibus et Matrimonio.

(b) This now by stat. 4 Geo. 4, must be on three Sundays.

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And as Lyndwood observes in the gloss :—“ Hæc
 “ pæna est suspensionis per triennium.” (a)

Here then is suspension for three years of the
 minister solemnizing matrimony without publica-
 tion of banns. Simon Mephram’s constitution is an
 authority also on this point :

“ Quia ex contractibus matrimonialibus absque
 “ bannorum editione præhabitâ initis, nonnulla pe-
 “ rricula evenerunt, et manifestum est indies prove-
 “ nire, omnibus et singulis suffraganeis nostris præ-
 “ cipimus statuendo quod decretalem *cum inhibitio*,
 “ (Quâ prohebitur ne qui matrimonium contrahant,
 “ bannis non præmissis in singulis ecclesiis paro-
 “ chialibus suæ diæcesis pluribus diebus solennibus,
 “ cum major populi affuerit multitudo) exponi
 “ faciant in vulgari, et eam firmiter observari,
 “ quibusvis sacerdotibus etiam non parochialibus,
 “ qui contractibus matrimonialibus ante solennem
 “ editionem bannorum initis præsumpserint inte-
 “ resse, pœnam suspensionis ab officio per triennium
 “ infligendo et hujusmodi contrahentes etiamsi nul-
 “ lum subsit impedimentum pœnâ debitâ percel-
 “ lendo.” (b)

Also Archbishop Stratford : (c)—Præsentis aucto-
 “ ritate concilii statuimus, quod exnunc matrimo-
 “ nia contrahentes, et ea inter se solennizari fa-
 “ cientes, quæcunque impedimenta canonica *in ea*
 “ *parte scientes*, aut præsumptionem verisimilem
 “ eorundem habentes ; sacerdotes quoque qui so-
 “ lennizationes matrimoniorum prohibitorum hu-
 “ jusmodi *seu etiam licitorum inter alios quam suos*
 “ *parochianos* in posterum scienter fecerint, diæce-

(a) Decretal. Greg. lib. 4, tit. 3, ch. 3.

(b) Lyndwood, book 4, tit. 3.

(c) Ibid.

“ sanorum vel curatorum ipsorum contrahentium
 “ super hoc licentiâ non obtentâ * * *
 “ majoris excommunicationis sententiam incurrant
 “ ipso facto.”

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The text law then especially prohibits priests from solemnizing marriage, even though lawful, between others than their own parishioners; and Lyndwood on the same chapter observes, “ Matri-
 “ monium dicitur clandestinum multis modis;” and amongst others, says, “ quia non præmittuntur
 “ publicæ denuntiationes sive banna publica.”

There is then no doubt, that, not only the parties contracting, but also the priest solemnizing clandestine marriages, were punishable by the ancient canon law as received and allowed here; and that a marriage, not preceded by publication of banns, or license, or between persons not parishioners, was in the meaning of that law a clandestine marriage; and this continued to be the law, down to the time of the passing of the marriage act (26 Geo. 2); at least, in 1736, it was so held in the case of *Middleton v. Croft*, (a) so often referred to and so much relied on in the argument. And the case of *Mattingley v. Martyn*, (b) was mentioned by Lord Hardwicke in support of this part of his judgment, where it was resolved:—“ That if any persons marry
 “ without publication of banns, or license dispensing
 “ with it, they are citable for it in the Ecclesiasti-
 “ cal Court;” and this even in the case of lay persons, so *a fortiori* in the case of the clergy.

The question then is simply reduced to this, whether the marriage act (c) by which a clergy-

(a) 2 Atkyns, 650.

(b) W. Jones, 257.

(c) 4 Geo. 4, c. 76.

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man knowingly and wilfully solemnizing marriage without due publication of banns, or license, is liable to be convicted as a felon, and to be transported for fourteen years, has repealed the canon law, and taken away the ancient jurisdiction of the Ecclesiastical Court in such matters; and this, undoubtedly, is a very grave and serious question, and deserves great consideration, more especially as there does not, as before observed, appear to have been any actual decision upon it; the only case which is to be found, being that of *Campbell, clerk v. Aldridge, clerk*, (a) which occurred shortly after the marriage act; (b) that case was to this effect, a clergyman was called upon to answer in the Ecclesiastical Court, for solemnizing marriage without banns, or license, and for performing other religious rites without the license of the ordinary, and a prohibition was prayed upon the suggestion, that since the marriage act, the offence was only cognizable in the temporal courts. The Court did not absolutely determine the point, but the prohibition was made absolute as to marrying without banns or license, the plaintiff having leave to declare in prohibition, in order that the question on the marriage act might be more solemnly argued and decided, thereby, as I understand, intimating an inclination against the jurisdiction of the Ecclesiastical Court; not deciding that point, as nothing further appears to have been done in the case; it cannot therefore be considered as a binding authority, and the rather, because the arguments upon which the application for a prohibition was founded, or the reasons of the judgment, are not given at length in the report. It is

(a) 2 Wilson, p. 79.

(b) 26 Geo. 2.

certainly somewhat extraordinary, that considering the great lapse of time between the passing of the first marriage act, and the present day, no traces are to be found of any other proceedings, either against parties, or clergymen, in the records of these courts, nor, as I believe, in the reports of cases occurring in the courts of common law, and the absence of any such proceedings may in some degree countenance the suggestion, that the general and received opinion has been, that the ecclesiastical jurisdiction no longer exists; otherwise numerous cases have occurred, in which it might be supposed that the law would have been put in force; but this is not conclusive, the law may exist, though it may have been suffered to sleep.

In the absence therefore of any direct precedent, the Court must consider this question of law upon principle, and such analogies as decisions in other cases may furnish for its guidance. Now it must be, and indeed has been admitted, that these courts have no power to inquire directly and originally as to any pleas of the crown, and upon the authority of Lord Hardwicke's opinion in the same case of *Middleton v. Croft*, it may perhaps be further admitted, that an Act of Parliament imposing a penalty recoverable in the temporal courts upon a particular offence, formerly cognizable in the Ecclesiastical Courts, would repeal any authority which those courts had by force of the canon law, unless there were words reserving the jurisdiction of those courts. But it would still remain as in that case to be inquired, whether the cognizance which these courts had of the particular offence charged in these articles, did at the time of the passing of the marriage act, solely and entirely depend upon the

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canon law, or whether that law was not sanctioned and confirmed by Acts of Parliament, and thereby made part of the statute law; and if so, then, whether those statutes have also been repealed by the marriage act.

Now here the same case of *Middleton v. Croft* seems to furnish a pretty strong precedent. Lord Hardwicke having declared that the ancient canon law respecting marriages was binding upon the laity, and *a fortiori* therefore on the clergy, proceeded to consider another head of argument which had been urged, namely, that as the statute 7 and 8 W. 3, c. 35, had imposed a penalty of 10*l.*, upon parties marrying without banns or license, to be recovered in the king's courts, it took away the ecclesiastical jurisdiction. Upon this his lordship observed, that "the general question, whether an Act of Parliament inflicting a pecuniary penalty, or other temporal punishment upon an offence, of which the spiritual court had a prior jurisdiction without a special saving thereof, doth not take away such jurisdiction, hath been much agitated and undergone diversity of opinions." He then proceeds to mention several cases in which different decisions had been given, and adds, that the case of *Matthews v. Burdett*, (a) in the first year of Queen Anne was thought of so much difficulty as to be solemnly argued, but by reason of the death of one of the parties, it was never determined;—"It must however," he continues, "be admitted, that where the ecclesiastical censure and temporal punishment are both levied against the same identical offence, the rule of *nemo bis*

(a) 2 Salk. 672.

“ *puniri debet pro eodem delicto* is a strong objection against allowing such a double proceeding, for how could a sentence in the Ecclesiastical Court be pleaded by way of *autrefois convict* to an action or information on the statute.”

This mode of reasoning seems to admit, that the case in Lord Hardwicke’s opinion had not at that time received any positive decision. It is therefore to be collected from these observations, and what follows, that it was at least the inclination of Lord Hardwicke’s opinion, as well as that of the other judges of the Court of King’s Bench whose judgment he was delivering, that if the statute of 7 and 8 W. 3, had imposed the penalty for a breach of the public order of the church, and as a punishment for that offence; the jurisdiction of the Ecclesiastical Court would have been repealed, so far as it depended upon the canon law alone; but considering that that statute, which imposed a duty on licenses, was passed *diverso intuitu*, i. e. for the protection of the revenue, the Court was of opinion that the statute and the canon law might both consist.

In the present case, however, the statute and the canon law are both directed against the same offence; the distinction, therefore, made in the case of *Middleton v. Croft* does not exist, and if the matter rested there, this Court would, I think, be bound to hold that, the Ecclesiastical Court had no power to entertain this question, supposing it to amount to a charge of felony. But the judgment in that case did not solely proceed upon the ground of that distinction, for Lord Hardwicke continues, “ further there is another ground to support this proceeding in the Ecclesiastical Court,

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“ and to distinguish this case from those which
“ have been cited in argument. The Rubric pre-
“ fixed to the office of matrimony in the Book of
“ Common Prayer, both that of 2 and 3 Ed. 6,
“ and 13 and 14 Ch. 2, says, first the banns of all that
“ are to be married together must be published in
“ the church thrice on several Sundays or holidays
“ in the time of Divine Service.”

“ This provision is confirmed,” he says, “ by
“ the several acts of uniformity of these kings, and
“ by reference is expressly made part of the re-
“ spective acts. The act of uniformity, 1 Eliz. c. 2,
“ re-enacts the Book of Common Prayer of Ed. 6,
“ without any alteration in this particular, and
“ has this clause, sect. 16, ‘ Be it further enacted,
“ ‘ that all archbishops, bishops, and all other their
“ ‘ officers exercising ecclesiastical jurisdiction, as
“ ‘ well in places exempt, as not exempt within
“ ‘ their dioceses, shall have full power and autho-
“ ‘ rity by this act, to reform, correct, and *punish*
“ ‘ *by censures of the church, all, and singular per-*
“ ‘ *sons who shall offend within any their jurisdic-*
“ ‘ *tions or dioceses against this act and statute ;*
“ ‘ any other law, statute, privilege, liberty, or pro-
“ ‘ vision heretofore made, had, or suffered to the
“ ‘ contrary notwithstanding.’ ”

The act of uniformity, 13 and 14 Ch. 2, c. 4,
s. 24, runs thus : “ And be it further enacted, that
“ the several good laws and statutes of this realm,
“ which have been formerly made, are now in force
“ for the uniformity of prayer and administration
“ of the sacraments within this realm of England
“ and places aforesaid, shall stand in full force and
“ strength to all intents and purposes whatsoever,
“ for the establishing and confirming of the said

“ Book of Common Prayer, hereinbefore mentioned,
 “ to be joined and annexed to this act, and shall
 “ be applied, practised, and put in use for the pu-
 “ nishment of all offences contrary to the said laws
 “ with relation to the book aforesaid, and no other.”

The inference which Lord Hardwicke drew from these enactments was, first, that by the express words of the 1 Eliz., the act of uniformity, offences against that act were punishable by the censure of the church ; and secondly, that by the act of uniformity, 13 and 14 Ch. 2, the power of the ordinary is continued and directed to be applied and practised, for punishing the like offence against the Rubric of the present Book of Common Prayer.

Lord Hardwicke then proceeds, “ Hereupon a new
 “ question arises, supposing that the enacting this
 “ pecuniary penalty by statute 7 and 8 W. 3, c. 35,
 “ might, by implication, have taken away or re-
 “ pealed any authority which the spiritual court
 “ had originally in this matter, *by force of the*
 “ *canon law*, whether it shall operate to take away
 “ a jurisdiction expressly given to it by a former Act
 “ of Parliament, and consequently, *pro tanto*, to
 “ repeal that Act of Parliament. The rule touch-
 “ ing the repeal of laws is, *Leges posteriores, priores*
 “ *contrarias abrogant* ; but subsequent Acts of Par-
 “ liament, in the affirmative, giving new penalties,
 “ and instituting new methods of proceeding, do
 “ not repeal former methods and penalties of pro-
 “ ceeding, ordained by preceding Acts of Parlia-
 “ ment without negative words ; and as in 7 and 8
 “ W. 4, c. 35, there are no negative words, both
 “ may stand together, and either the one or the
 “ other may be put in execution. Besides, a latter
 “ Act of Parliament hath never been construed to

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“ repeal a prior act, without words of repeal, unless
 “ there be *a contrariety* and repugnance between
 “ them, or at least some notice taken of the former
 “ law, in the subsequent one, so as to indicate an
 “ intention in the law makers to repeal it.” So
 that Lord Hardwicke’s opinion seems to be, that in
 order to repeal an existing statute, the latter statute
 must either have express words of repeal, or must
 be contrary to the provisions of the law said to be
 repealed; or that, at least, mention must be made
 of that law, showing an intention of the framers of
 the latter Act of Parliament to repeal the former.

How then does the matter stand in this respect,
 with reference to the present case, if tried by these
 tests?

First, There are no express words of repeal in
 the 4 G. 4, c. 76, so that the case stands clear of
 that objection.

Secondly, Are the provisions of the marriage
 act repugnant, or contrary, to the existing law?
 I can find none such, on the contrary they seem to
 be confirmatory of it as will appear more particu-
 larly in considering the third test proposed, namely,
 whether there was any intention on the part of the
 legislature to repeal the pre-existing law, to be dis-
 covered either with reference to the provisions of
 the 26 G. 2, or 4 G. 4. These acts direct that the
 banns shall be published in the parish church, or
 in some public chapel, in which public chapel,
 banns of marriage have been usually published of
 or belonging to such parish or chapelry, wherein
 the persons to be married shall dwell, according to
 the form of words prescribed by the Rubric pre-
 fixed to the office of matrimony in the Book of
 Common Prayer (these rules being clearly drawn

from and founded on the ancient canon law) during the time of morning service, or of evening service, if there shall be no morning service, in such church or chapel upon the Sunday, upon which such banns shall be so published, immediately after the second lesson; and whenever it shall happen that the persons to be married shall dwell in divers parishes or chapelries, the banns shall in like manner be published in the church or such chapel as aforesaid belonging to such parish or chapelry wherein each of the said persons shall dwell, and that all other the rules prescribed by the said Rubric concerning the publication of banns and solemnization of matrimony shall be strictly observed. So far then, the Act of Parliament differs from the Rubric, in directing that the banns shall be published on three Sundays (not holydays as in the Rubric) and after the second lesson, instead of after the Nicene creed, but in every other respect, it adopts and confirms the rule therein given for the publication of banns and solemnization of matrimony, and is, therefore, very far from indicating any intention to repeal the existing law in any other particulars than those to which I have referred; but the tenor of the act, in other places, clearly supposes that the ecclesiastical law continued in force and operation. By the subsequent sections of the same Act of Parliament, and also in 4 Geo. 4, c. 76, it is provided, that no minister in solemnizing marriages between persons both or one of whom shall be under the age of twenty-one years, after banns published shall be punished by *ecclesiastical censures* for solemnizing such marriages without consent of parents, or guardians whose consent is required by law, unless

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such minister shall have notice of the dissent of such parents or guardians, and in case such parents or guardians, or one of them, shall openly or publicly declare, or cause to be declared, in the church or chapel where the banns shall be so published at the time of such publication, his, her, or their dissent to such marriage, such publication of banns shall be absolutely void. This section of the Act of Parliament certainly repeals that part of the 62nd canon of 1603, which prohibited marriages between minors before the parents or governors of the minor personally, or by sufficient testimony, signified their consent to the marriage. But supposing that the minister, after notice of dissent, should proceed to the solemnization of the marriage, he would clearly not have been exempted from ecclesiastical censures, and would as clearly be liable to be convicted of felony and to transportation for fourteen years, for knowingly and wilfully solemnizing marriage without due publication of banns; the publication being by the same sections declared to be absolutely void. These then are strong indications, that it was not the intention of the legislature to repeal the ecclesiastical law on this subject; but that both should stand together. I cannot, therefore, but think that these Acts of Parliament do not, and were not meant to, repeal the authority of the Ecclesiastical Courts in cases of this description, but that one and the other may be put in execution; and this, even in cases where the conduct of the minister may have been such as to render him liable to an indictment and conviction of felony.

But does it follow that the offence imputed by the present articles necessarily constitutes, or that

Mr. Wynn would be convicted of felony, if the whole of the articles were proved. It is not in any one part, or in the whole taken together, alleged that the party cited has *knowingly and wilfully* married any persons without due publication of banns; true it is, that he is accused of publishing the banns of marriage, and of solemnizing matrimony between persons neither of whom were residing in his parish, and this may by reference to the provisions of the Act of Parliament, be considered as a marriage without due publication of banns; the clear intendment of the law being that banns shall be published between persons resident in the parish, and that banns not so published shall be null and void. But then the minister must knowingly and wilfully offend against the act to incur the penalty. Now the ecclesiastical law is in this case sought to be enforced against him, for having neglected to satisfy himself that the parties whose banns were published were resident, or dwelt within his parish—for not using the means provided by the law, to satisfy himself of the residence of the parties before he published the banns, or before he proceeded to solemnize the marriage between parties whose banns had been published by other persons in his church, and not for any wilful violation of the law.

It is, indeed, true, as observed by Dr. Phillimore, that the law is not imperative upon him to require seven days' notice before he publishes the banns, nor would he be punishable for publishing the banns without that particular notice, or the expiration of the seven days; but if he chooses to dispense with the notice which he is entitled to require, and if it should turn out, that the parties are not entitled to

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have the banns published in his parish, he must take upon himself the consequence of his own neglect to do that which the law has provided for his security; he cannot be allowed to shelter himself under the excuse that he was ignorant of the fact of their non-residence in the parish, when he might, and ought to have inquired into the facts. This view of the law is supported by cases which have occurred elsewhere, particularly in the Court of Chancery, which, although they may not perhaps have the authority of absolute decisions upon the point; yet as the observations made therein necessarily arise out of the proceedings, and are intimately connected with them, and are not therefore to be treated as mere *obiter dicta*; and considering the persons from whom they fall, and the frequent repetition of them, they are entitled to great weight and attention.

In the case of *Moore v. Moore*, (a) in 1741, which was before the marriage act, 26 Geo. 2, Lord Hardwicke said, “ It is very surprising when canons, with respect to marriages, have laid down directions so plainly for the conduct of ecclesiastical officers and clergymen (which though they have not the authority of an Act of Parliament, and consequently are not binding upon laymen, yet certainly are prescriptions to the Ecclesiastical Courts, and likewise to clergymen) that there should be such frequent instances of their departing from them, and introducing a practice entirely repugnant to them, *vide* Can. 62, 102, &c., in 1603, all of them extremely plain in their directions to ecclesiastical officers and clergymen: one would think no body ever read them, neither

(a) 2 Atkyns, 157.

“ the officers of the spiritual courts, nor clergymen,
 “ or they could not act so diametrically opposite
 “ to them.

“ No ecclesiastical persons can dispense with a
 “ canon, for they are obliged to pursue the direc-
 “ tions in them with the utmost exactness, and it
 “ is in the power of the crown to do it only.

“ What Mr. Charles (the clergyman) swears, I
 “ believe is true, that it is very frequent for sur-
 “ rogates to fill up the blanks in licenses with the
 “ name of any other parish, and this in some mea-
 “ sure may justify him, as it is the common method
 “ among clergymen; but then this will not excuse
 “ with regard to penalties in the canon, which ex-
 “ pressly directs that no clergyman shall presume
 “ to marry a person out of the parishes in which
 “ the man and woman reside.”

In *Priestly v. Lamb*, (a) in which there had been a marriage by banns at the parish church of St. Andrew, Holborn, between a young lady who was at school at Camberwell, and a person who had chambers at Furnival’s Inn. The parties left Camberwell on the morning of the marriage, and it did not appear that the lady had actually resided in Holborn; they were afterwards again married at Lambeth, and the clerk of the parish stated in his affidavit, that, *it is not customary to make any inquiry as to the residence of parties applying to be married*; Lord Eldon said, “ By the affidavit of the clerk of
 “ the parish of Lambeth, it is disclosed that they
 “ conceive in that parish, that they do their duty
 “ to the public and to the individuals whom they
 “ are to marry, never making any inquiry as to

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“ the residence of the parties. In the canon law
 “ which binds the clergy of this country, from 1328
 “ to 1603, it is laid down, that it is highly crimi-
 “ nal to celebrate marriage without a due publica-
 “ tion of banns, which must be interpreted a publi-
 “ cation of banns by persons having to the best of
 “ their power informed themselves, that they pub-
 “ lish banns between persons resident in the parish ;
 “ and very heavy penalties are by that law in-
 “ flicted upon clergymen celebrating marriage with-
 “ out license, or a due publication of banns.” He
 then goes on to mention the penalty by statute,
 felony, and adds, “ A subsequent clause makes it
 “ felony in a clergyman to celebrate marriage
 “ without license or publication of banns. I do
 “ not mean to intimate that a clergyman believing
 “ there was a residence would be guilty within
 “ that clause. But upon the principles of the com-
 “ mon law, as well as the statute law, laying pe-
 “ nalties upon marriage without license or a due
 “ publication of banns, though such a fact should
 “ not be within the meaning of that clause, it has
 “ the character of an offence within the law of this
 “ country. What other sense can be given to the
 “ 10th section of the act, which looking at the per-
 “ son ruined, as this girl is, enacts, that after there
 “ has been a marriage *de facto* with publication of
 “ banns, no evidence shall be given to disprove
 “ the fact of residence in any suit in which the va-
 “ lidity of the marriage comes in question. But
 “ for all other purposes it may be the subject of
 “ inquiry ; and the law of the country would reach
 “ it by a criminal information.” Lord Eldon goes
 on, “ From what I have seen in this Court, alluding
 “ to the cases in which Lord Thurlow and Lord

“ Rosalyn ordered the attendance of the clergymen,
 “ I know that this subject is carried on with a
 “ negligence and carelessness that draws in gentle-
 “ men of good intentions ; and I feel that it may
 “ be very difficult in this great town with all pos-
 “ sible diligence, to execute this duty as effectually
 “ as the law seems to require that they should ex-
 “ ecute it : but where a case has occurred in which
 “ it is clear, that if any one of the parties had done
 “ what the law required from all of them, this mar-
 “ riage could not have taken place, I must say it
 “ amounted to a criminality, which I hope will not
 “ occur in future.” Observations to the same effect
 were also made by Lord Eldon, in the cases of
Nicholson v. Squire, (a) and *Warter v. Yorke*. (b)

For the several reasons, therefore, which I have
 stated, I am of opinion that the original jurisdiction
 which the Ecclesiastical Courts possessed and
 exercised in cases of this description, is not taken
 away by any of the statutes ; that the ordinary is
 still entitled to proceed to the correction of any of
 his clergy who may offend against the order of the
 church, in publishing banns and solemnizing
 matrimony in any other manner than that prescribed
 by the law ; and that if the charges contained in
 these articles shall be established by evidence, Mr.
 Wynn is liable to be canonically punished for such
 offence.

I now proceed to consider the next objection
 raised in argument, which is against the jurisdiction
 of the particular Court in which these proceedings
 have been instituted, namely, in the Consistorial
 Court of the diocese, in which the parish in ques-

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(a) 16 Ves. 259

(b) 19 Ves. 453.

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tion is locally situated, and on this part of the case it is said, that the parish of St. Nicholas is pleaded to be in the deanery of Hereford, the dean being described as ordinary, and that there is no averment that the bishop has any jurisdiction in this part of the diocese at any time; or that if he has, it is not alleged that there was any triennial visitation at the time this suit commenced; it being merely pleaded inferentially in the 18th article amongst other things, that "by reason of the triennial visitation of the bishop, the party cited was liable to the jurisdiction of the Consistorial Court." When this objection was first raised, it made some impression on the mind of the Court, and it had some doubt, whether, this being a criminal suit, it could permit the parties to plead the jurisdiction more fully; but on further consideration, and looking to what has been done in other cases, particularly in that of Schultz and Hodgson (*a*), in which, even after articles had been admitted, and an issue given in the Court below, the cause having been appealed in a subsequent stage, this Court permitted additional articles to be given in; not indeed pleading new matter, but by way of supply of proof of what had been before pleaded. So here, particularly as the articles have not been admitted, and consequently issue has not been joined, I think that the Court is at liberty to permit the party to plead the fact of the bishop's triennial visitation at the time in question, and to exhibit a copy of the inhibition in supply of proof; and the rather, because no protest to the jurisdiction of the Court has been made in act on petition,

(*a*) 1 Addams, 281.

nor has it been intimated or suggested that the Court had not jurisdiction; all that is said being that the jurisdiction does not clearly appear on the face of the articles; all the subsequent acts of the party rather tend to confirm the jurisdiction than to impeach it: and on this additional ground, that, as was stated by Dr. Lushington, the bishop *prima facie* has jurisdiction over the whole of the diocese, and that it lies upon the party impugning his jurisdiction to show that he has parted with it, and that even if he had, he might still have a concurrent jurisdiction, or even an exclusive one in the time of his triennial visitation; and it is for its own satisfaction that the Court requires this addition to the articles.

Having thus disposed (so far as this Court can dispose of it) of the question of general and particular jurisdiction, I proceed to consider the specific objections which have been made to the articles themselves, and here it may be observed, that in all cases, but particularly in cases of correction, the articles should contain a clear and distinct statement of facts intended to be proved—not travelling into extraneous or argumentative matter—and that they should be as succinctly drawn as the nature of the case will allow; and the present articles have been objected to as not conforming to these principles, and in some measure I accede to the observation; I think that they are in some measure too diffuse, and that they will bear curtailment; but I do not think that the objection, that too many charges are contained therein, or that they impose an undue burthen upon the appellant, is well founded. I think the case required an iteration of specific instances, and that this has

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been occasioned by the act of the party himself in continuing the practice after the remonstrances of his ordinary,

The Court then, after minutely canvassing the objections taken to the articles, pronounced for the Appeal, rejected some of the articles, and directed others to be reformed.

The articles were afterwards admitted as reformed, and were in substance as follows :—

First, The institution of the Rev. Thomas Wynn, on 16th April 1820 to the Rectory of St. Nicholas, in the city of Hereford.

Second, An authentic copy of the entry of such institution in the muniment book kept in the registry of the Dean of Hereford.

Third, That in and by the 62nd of the constitutions and canons of 1603, it is provided, “ that no
 “ minister upon pain of suspension *per triennium*
 “ *ipso facto*, shall celebrate matrimony between any
 “ persons without a faculty or license duly granted,
 “ except the banns of matrimony have been first
 “ published three several Sundays or holydays in
 “ the time of Divine Service in the parish church
 “ or chapels where the said parties dwell, according
 “ to the Book of Common Prayer.”

Fourth, That by the 2nd section of statute 4 Geo. 4, c. 76, it is enacted, “ That from and after the first
 “ day of November, 1823, all banns of matrimony
 “ shall be published in an audible manner in the
 “ parish church or in some public chapel, in which

“ chapel banns of matrimony may now or may
 “ hereafter be lawfully published, of or belonging
 “ to such parish or chapelry wherein the persons to
 “ be married shall dwell according to the form of
 “ words prescribed by the Rubric prefixed to the
 “ office of matrimony in the Book of Common
 “ Prayer, upon three Sundays preceding the so-
 “ lemnization of marriage during the time of morn-
 “ ing service, or of evening service (if there shall
 “ be no morning service in such church or chapel
 “ upon the Sunday, upon which such banns shall
 “ be so published) immediately after the second
 “ lesson; and whensoever it shall happen, that the
 “ persons to be married shall dwell in divers
 “ parishes or chapelries, the banns shall in like man-
 “ ner be published in the church or in any such
 “ chapel, as aforesaid, belonging to such parish or
 “ chapelry wherein each of the said persons shall
 “ dwell; and that all other, the rules prescribed
 “ by the said Rubric, concerning the publication of
 “ banns and the solemnization of matrimony, and
 “ not hereby altered, shall be duly observed; and
 “ that in all cases where banns shall have been
 “ published, the marriage shall be solemnized in
 “ one of the parish churches or chapels where such
 “ banns shall have been published, and in no other
 “ place whatsoever.” That by the 7th section of
 the said act it is expressly provided, “ That no par-
 “ son, vicar, minister, or curate, shall be obliged
 “ to publish the banns of matrimony between any
 “ persons whatsoever, unless the persons to be mar-
 “ ried shall, seven days’ at the least before the time
 “ required for the first publication of such banns,
 “ respectively deliver, or cause to be delivered, to
 “ such parson, &c. a notice in writing, dated on

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“ the day on which the same shall be so delivered
“ of their true Christian names and surnames;
“ and of the house or houses of their respective
“ abodes within such parish or chapelry, as afore-
“ said, and of the time during which they have
“ dwelt, inhabited, or lodged in such house or
“ houses respectively.”

Fifth, That notwithstanding the premises you, the said Rev. Thomas Wynn, have been for several years last past, in the frequent practice of publishing in your said parish church of St. Nicholas, the banns of marriage between persons described in such banns as of, or belonging to your said parish, although at the times of such banns being published, neither of such persons were resident in or of, or belonging to your said parish; and afterwards of marrying certain of the persons whose banns were so published in virtue of such undue publication, as hereinafter particularly set forth.

Sixth, That by reason of the premises, the marriages had in your said parish have, for several years last past, been much more numerous than they would have been, had the same been solemnized between persons only of your said parish; in part supply of proof, that by the last returns of population made pursuant to the act of 11 Geo. 4, c. 30, the population to whose use your said parish church is appropriated for marriages is 1134, and no more, and that the total number of marriages in your said church, within the period of six years, on the 31st of December, 1833, was 266.

Seventh, That the following, among other marriages, were had and solemnized by you, the said Rev. Thomas Wynn, in your said parish church in virtue of banns published between the parties, in

which banns both the said parties were described as of your said parish of St. Nicholas, to wit, on 31st of December, 1828, Thomas Powell Chamberlain to Sarah Colcomb; in 1832, 5th of February, William Prosser to Ann Coburn; 2nd of April, Richard Preece to Ann Gwillam; that neither of the said parties were resident in or parishioners of your said parish, but were at such times severally and respectively resident as follows:—Thomas Powell Chamberlain and Sarah Calcomb both in the parish of Much Mansel, in the county of Hereford; William Prosser and Ann Coburn both in the parish of All Saints, in the city of Hereford; Richard Preece and Ann Gwillam both in the parish of Stoke Edith, in the county of Hereford, &c.

Eighth, That in the year 1833, the following among other marriages, &c. &c., setting forth twelve instances in the same form as in the preceding article.

Ninth and tenth were struck out.

Eleventh, Also, that within the current year, 1834, the following, &c., 2nd of February, Richard Ackland to Mary Lewis; 10th of February, Thomas Jones to Elizabeth Pritchard; 16th of February, John Lloyd to Mary Lloyd; that at such times not resident in, &c. as in the former articles.

Twelfth and thirteenth were struck out.

Fourteenth, That in the commencement of this current year, 1834, you, the said Thomas Wynn, were duly remonstrated with respecting your irregular conduct in marrying persons who did not dwell or reside in your said parish of St. Nicholas, by your ordinary, the Dean of Hereford, and warned to be more careful for the future in relation thereto; but we farther article and object that, notwithstanding

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ing such remonstrance and warning you, the said Rev. Thomas Wynn, continued to publish the banns of matrimony between persons who did not dwell or reside in your said parish ; and thereupon, your ordinary, the Rev. John Merewether, Doctor in Divinity, the Dean of Hereford, wrote and sent you, on or after the 14th of March, this year, a written admonition in words following (that is to say) :

“ REV. SIR,

“ I had hoped that my visit to you would
 “ have had the desired effect, and it was my earnest
 “ wish by that course, which I adopted as most
 “ likely to prevent anything disagreeable to your
 “ feelings, to induce you to guard against such
 “ gross irregularities for which you are responsible,
 “ (not the clerk) and thus to prevent the painful
 “ necessity of further interference on my part. I
 “ regret to find, by official communications made
 “ to me since my return, that the evil still con-
 “ tinues, and that several most flagrant cases have
 “ occurred.

“ It now becomes an imperative duty on me, as
 “ ordinary, to require that in all cases of the pub-
 “ lication of banns, you will insist in having seven
 “ days’ notice according to the Act of Parliament,
 “ and will personally satisfy yourself, that the
 “ parties are actually and *bonâ fide* inhabitants of
 “ your parish, or at least one of them, and that
 “ you will not marry any couple, one of whom
 “ belongs to another parish, without the certificate
 “ of the publication of banns in his or her parish.
 “ I must also require, in case you have any parties
 “ under publication of banns at this time, that

“ you will satisfy yourself that they are resident in
 “ your parish, or that you will suspend the future
 “ publication of them until you are so satisfied.

“ I am, Rev. Sir,
 “ Your faithful servant,
 “ JOHN MEREWETHER, Dean.”

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And we further article and object to you, &c. that
 your said ordinary, the said Dean of Hereford,
 did on or about the 17th of April in the current year,
 write and send to you a letter in the words follow-
 ing (that is to say):

“ DEAR SIR,

“ I am informed that a couple whose banns
 “ have been published in your church the second
 “ time last Sunday, by name William Watkins and
 “ Ann Dovey are not parishioners, nor residents in
 “ your parish; the man took a lodging, and slept
 “ one night in that lodging, where some of his things
 “ remain, but that you are aware is not sufficient.
 “ I should have been sorry, had this come to my
 “ knowledge, after the persons had been married,
 “ but it proves the necessity which exists for my
 “ pressing on you the duty of personally ascer-
 “ taining the fact of residence, and the strict ob-
 “ servance of the provisions of the Act of Parlia-
 “ ment.

“ I remain, dear Sir,
 “ Your faithful servant,
 “ JOHN MEREWETHER.”

Deanery, 17th April, 1834.

Fifteenth, Also, &c., that notwithstanding, as well
 the personal remonstrances and warning, as the

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written admonitions and injunctions of your said ordinary, &c. as pleaded, you, the said Rev. Thomas Wynn, continued to go on in your unlawful and irregular practice of publishing the banns of matrimony in your said parish church between persons, &c., and that since such remonstrance you have, in the course of this current year, 1834, published the banns of matrimony between the following persons respectively, all described of your said parish, to wit, William Watkins and Ann Dovey ; James Jones and Elizabeth Cotterell ; Henry Woodhouse and Susan Pulling ; John Baker and Jane Hinton ; John Smith and Mary Cooper ; further (as before) that neither of the said parties are of your parish, &c. &c.

Sixteenth and seventeenth were struck out.

Eighteenth, That you, the said Rev. Thomas Wynn, are of the parish of St. Nicholas, in the Deanery of Hereford, and therefore, and by reason of the premises, and of the inhibition issued by the Lord Bishop of the Diocese of Hereford, at, or on account of his triennial visitation, and of your appearance herein given, were and are subject to the jurisdiction of this Court ; and we further article and object, that notice of such inhibition was duly given to the parties inhibited pursuant to the tenor thereof, and that the same came into operation on the 10th of July, 1834, and continued in operation for the space of three months, and in part supply of proof of the premises, a copy of the original inhibition was exhibited.

Nineteenth and twentieth, The usual concluding articles.

PREROGATIVE COURT OF CANTERBURY.

GRIFFIN AND AMOS (LEGREW AND OTHERS INTER-
VENING) v. FERARD.

JUDGMENT.

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SIR HERBERT JENNER.

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The question in this case arises as to the validity of a paper propounded as a codicil to the will of Daniel Agace, Esq., who died in the month of April, 1828, having made and duly executed a will and two other codicils respectively dated; the will, 12th of April, 1820, the first codicil, 13th of February, 1826, the second codicil, 20th of April, 1828.

A paper not dispositive, upon the face of it, nor shown to be by extrinsic evidence, not entitled to probate.

The paper in question, which is all in his own handwriting and is addressed to his executors, being dated on the 20th of April, 1820, is signed by the deceased, but not in the presence of witnesses.

Shortly after the deceased's death, these papers were all found together, in the same envelop. Upon applying for probate, a doubt was suggested by the registrars of the Court, whether the paper of the 20th of April, 1820, was testamentary, and it was stated in argument, that on this doubt being raised, the opinion of counsel was taken, when the parties were advised that the paper was not testamentary; and accordingly probate was taken of the will and the regularly executed codicils; it

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being as alleged at that time considered to be immaterial, whether the paper now propounded was included in the probate or not. Circumstances, however, have since occurred which have rendered it necessary to take the opinion of this Court, as to the character of this paper.

The probate was accordingly called in, and the paper has been propounded by two of the executors named in the will, and also by other parties claiming an interest under it, who have intervened in the cause, and have brought in an allegation supplemental to that which was offered on behalf of the executors; and on the admissibility of these allegations, the Court is now called upon to determine.

Before considering the facts pleaded in the allegation, it may be proper to look at the instrument itself, and what it purports to be, for the terms in which it is expressed may be so clearly dispositive as not to require any extrinsic aid to entitle it to probate; or on the other hand, it may bear so little the character of a testamentary disposition, as to be scarcely capable of having that character impressed upon it, by any circumstances whatever; it is in these words: "I hereby inform the executors named
" in my last will and testament, dated 12th of
" April, 1820, that the sum of twenty thousand
" pounds, three per cent. consolidated annuities,
" part of the stock standing in my name in the
" books of the governor and company of the Bank
" of England, is stock in trust conformably to the
" will of my late uncle, Zachariah Agace, late of
" Stamford Hill, in the parish of Hackney, in the
" county of Middlesex, dated the 3rd of Novem-
" ber, 1775, and which said sum, after my decease,

“ is by his said will directed to be divided among
 “ sundry persons, his relations. I therefore here-
 “ by request my said executors to transfer and di-
 “ vide the said sum of twenty thousand pounds,
 “ three per cent. consolidated annuities, in confor-
 “ mity with the directions given in the will of my
 “ said uncle.” It is dated Ascot Place; 20th of
 April, 1820, is signed by the deceased, and is ad-
 dressed to his executors: the main purport, there-
 fore, of the paper is to inform his executors that
 the sum of 20,000*l.* consols, part of the stock
 standing in the deceased’s name, was not his pro-
 perty, but was held in trust conformably to the will
 of his late uncle, and that after his (the writer’s) de-
 cease, it was directed to be divided between sundry
 relations of his uncle; and he therefore requests
 the executors to transfer and divide that sum in
 conformity with the instructions given in his uncle’s
 will.

On the face of the instrument then, it does not
 purport to dispose of any property belonging to the
 deceased, it is mere information to his executors
 that the stock mentioned in it does not belong to
 him, but to the persons entitled under his uncle’s
 will, to whom they are to transfer it; it is, there-
 fore, merely explanatory, giving his executors ne-
 cessary information for their guidance, as *prima*
facie, the stock standing in his name would appear
 to be his property: and such seems to have been
 the understanding of all parties who conceived, as
 will presently appear, that the property passed
 under the will of *Zachariah Agace*, and not under
 that of *Daniel Agace*; such also seems to have
 been the understanding of the deceased himself,
 who does not appear to have had any idea that he

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had any thing more than a life interest in the property mentioned in it. Notwithstanding, however, this impression of the parties, it is certainly open to them, even at this time to contend that the paper is a part of the testamentary disposition of Mr. Daniel Agace; and that as such, whatever be its form, it is entitled to the probate of this Court. It is undoubtedly true that the Court is not precluded from granting probate of a paper on account of the form in which it is drawn up. Papers having less testamentary appearance than the present (which is addressed to the executors) have been admitted to probate, such, for instance, as deeds of gifts, notes of hand, drafts upon bankers, and others; the Court only requiring to be satisfied that it was the intention of the deceased, that they should be carried into effect after his death, although the purport of the instruments might not be strictly testamentary.

It is then necessary to consider the circumstances which are pleaded in these allegations from which the Court is to collect, that this paper was written by the deceased, *animo testandi*, for *that* I apprehend is necessary to be proved, where the paper, upon the face of it, does not purport to be of a testamentary nature; for there seems to be this distinction in the consideration of papers which are in their terms, dispositive, and those which are of an equivocal character, that the first will be entitled to probate, unless, as in the case of *Nicholls v. Nicholls*, (a) cited in the argument, they are proved not to have been written *animo testandi*; whilst, in the latter, the animus must be proved by the party

*Cited in Hapgood's Reports
 March 22. 1846.*

(a) 2 Phill. p. 180.

claiming under it, and this I take to be the sum and substance of the principles which have been established by the cases which have been adverted to in argument, which it would be useless to notice farther, for it would be to set about proving first principles, if the Court were to cite cases, for the purpose of showing, that the object of all inquiry in a Court of probate, is to ascertain the intentions of the alleged testator, even in the case of an executed dispositive instrument; for as the Court observed in the same case of *Nicholls v. Nicholls*, a witness attests a will for the purpose of giving authenticity to the factum of the instrument, the *animus testandi* is the very point into which the Court of probate is to inquire the mere act of witnessing or signing does not exclude, of necessity, the absence of the *animus testandi*, any more than the mere act of cancellation excludes of necessity the absence of the *animus revocandi*. It may have been signed under duress, or under other circumstances, when there was no intention to make a testamentary disposition.

Now that the paper propounded in this case is of an equivocal character *at least*, cannot, I think be doubted; no person reading it can pronounce that, of itself, and abstracted from all extrinsic circumstances, it purports to dispose of any part of the writer's property, or of that over which he had a disposing power; and in fact, as, has already been stated, it has not hitherto been treated as such, or as having a testamentary character either here or elsewhere; and the parties who propound it have accordingly thought it incumbent on them to set forth the special circumstances from which its character is to be defined.

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The first article of the allegation on behalf of the executors, pleads the death of the uncle of the deceased in this cause in 1778, and that by his will, dated in 1775, he gave his brother, Jacob Agace, during his life 300*l.* per annum, to his nephew, Zachariah Agace, 150*l.* per annum; to his nephew, Daniel Agace, (the deceased in this cause) 150*l.* per annum; and in case either of his nephews should die, the other to inherit the whole 300*l.*; and in case of the death of his brother Jacob, without issue, then the two nephews, Zachariah and Daniel, were to inherit from his brother Jacob; so that the survivor was to take the whole 600*l.* per annum for his life. Mr. Zachariah Agace went on to assign his reason for giving his brother and nephews the interest of the money only, which was that in the event of their dying without issue the money might be divided amongst his relations; namely, his cousins, James Legrew, Mrs. Susan Goddard, and Mrs. Esther Privo; in three equal shares, it being clearly understood, the testator adds, “ what I leave “ is to them and their heirs;” and it goes on to plead that the deceased’s three cousins survived him.

The allegation then went on to plead, that no particular fund having been specified by the deceased, out of which, these annuities to his brother and nephews, were to issue, the executors, of whom Mr. Daniel Agace was one, and ultimately the survivor, set apart the sum of 20,000*l.* three per cent. consols to answer them, and that at the time of the death of Mr. Daniel Agace, this sum being part of a larger sum in the same stock was standing in his name.

The third article pleaded the death of Mr. Daniel Agace in April, 1828, and the factum of the will

and two codicils, by which after giving several legacies to different persons he bequeathed, the rest and residue of his estate and property of what nature and kind soever, to Ann Ferard, who is the other party in this cause.

The allegation then pleaded the writing of the paper propounded, as directions to his executors, on the 20th of April, 1820, and that it was found in the same envelop with his will, and two executed codicils; the doubt that arose as to its character; the exclusion of it from the probate; and that it had been necessary to obtain the judgment of the Court as to its title to probate, in consequence of certain proceedings relative to this sum of 20,000*l.* consols in the Court of Chancery; and concluded with pleading the paper to be in the handwriting of the deceased.

The nature of the proceedings in the Court of Chancery was not stated in the allegation of the executors; but in the supplemental allegation given in by the proctor of the parties intervening, those proceedings are set forth, and very properly.

It appears that in Easter Term, 1829, a bill was filed by them as the representatives of the three cousins named in the will of Mr. Zachariah Agace against the executors of Mr. Daniel Agace, praying that it might be declared, that they (the plaintiffs) having survived Mr. Zachariah Agace were entitled to equal shares of the 20,000*l.* consols, and to the dividends which had accrued since the death of Mr. Daniel Agace, and that the same might be transferred to them; claiming, therefore, under the will of Mr. Zachariah, and not under that of Mr. Daniel Agace, which does not seem to have been even alluded to. The cause came on to be heard

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before the Master of the Rolls, who, on the 25th of February, 1831, dismissed the bill, but without costs, and this decree was confirmed by the Lord Chancellor, on the 15th of November in the same year, on the ground as alleged, that the bequest over being too remote in construction of law, it was consequently void; and the allegation pleads that by reason thereof, Daniel Agace was possessed of a legal and equitable interest in, and had a testamentary power over, the said sum or part of it, as well at the time he wrote the codicil propounded; as at the time of his death, and that he wrote the paper in question with the intention of carrying into effect the will of Zachariah Agace, and more especially of bequeathing the sum of 20,000*l.*, over which he had a disposing power, and in which he had a legal and equitable interest.

It then pleaded that the residuary legatee under Mr. Daniel Agace's will filed a bill in Chancery, on the 5th of June, 1835, against the executor of his will, praying that it might be declared that according to the true construction of Mr. Zachariah Agace's will, she had become entitled to the said sum of 20,000*l.*, three per cent. consols, and the dividends accrued thereon since Mr. Daniel Agace's death.

Such is the substance of the two allegations, and it may be observed, that the original character of the paper cannot be altered by any thing which has subsequently occurred—if it was testamentary when written, it still retains that character, if merely explanatory, it remains so—and the circumstances pleaded are of no other use than as affording the means of enabling the Court to judge *quo animo* it was written.

I have already said, that the paper does not appear to me to be "*per se*," dispositive, neither do I think that the circumstances of its being found with the will and two codicils infers that the deceased considered it to have, or intended to give it, a testamentary character, the information which it conveys was necessary for his executors, and no fitter place for deposit could be selected than that in which the will and codicils were placed, where it would meet the attention of the executors, at the same time, with those instruments which they were to carry into execution; that circumstance, therefore, may be laid out of consideration, as may also for the same reason that of its being addressed to his executors, and who, as Mr. Daniel Agace was the surviving executor of his uncle, became the representatives of the latter, and as such, the persons to carry the unexecuted trusts of his will into effect.

The next consideration is, *did the deceased know that this property belonged to him?*—certainly not at the time when the paper was written, for the object of the paper is to tell his executors, that that part of the property was not his, and there is but little probability that he obtained any further information on that point before his death, it nowhere being suggested that any doubt had arisen as to the legality of the disposition contained in Mr. Zachariah Agace's will, till after Mr. Daniel Agace's death, when it became necessary to ascertain the right of the several claimants to it; if then Mr. Daniel Agace was ignorant that the legal or equitable interest in this property vested in him—whatever the law may presume, as to a man's knowledge of his own rights—he could not have had an inten-

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tion of disposing of it. True it is, that a person may dispose of property by will without knowing that he had the *jus disponendi*, as in the case of a residuary legatee, who would be entitled to whatever personal property might accrue to the deceased between the date of the will and the time of his death when it is to have effect, nay, would become entitled to property which the deceased never did know he possessed, either by succession to a person of whose death he was ignorant, or under some testamentary disposition of which he had no knowledge. But this proceeds entirely upon the principle that it must be presumed to be the testator's intention, to give to the person named residuary legatee, whatever was not specifically bequeathed. If, therefore, this paper were clearly testamentary, the Court would have no right to inquire whether the deceased knew his right or not, but would be bound to grant probate of it, and leave its effect to be afterwards determined. But the case is very different where the question is, with what intention a paper, not clearly entitled to a testamentary character, was written, in such a case, a knowledge of the *jus disponendi* seems to be essential to the *animus testandi*, the latter could hardly exist without the former; and as I think it to be perfectly clear in this case that the deceased was ignorant, that he possessed the *jus disponendi* of this stock, he cannot be considered to have written this paper with the intention of bequeathing it.

It has been said that Mr. Daniel Agace might, as an honest man, have thought it incumbent upon him to carry his uncle's intentions into effect, and not to take advantage of the legal objection to the disposition contained in his will; but this argu-

ment again supposes that he knew that he possessed the right, if he did not, there was no room for the operation of those honourable feelings upon his mind. None of these circumstances then, whether taken singly or combined together, are in my judgment sufficient to give a testamentary character to this paper which it did not of itself possess. Again, if we look to the persons by whom the benefit of this property is now claimed, is there any reason to suppose that the deceased would have bequeathed it to them, had he known that he had the power to do so?—unless, indeed, under the impulse of those feelings which have been suggested as likely to have influenced him, to fulfil his uncle's wishes—they are the representatives of the original legatees, with whom he is not shown to have lived on terms of intimacy, or even to have been acquainted; the parties whom they represent, and who were the particular objects of Mr. Zachariah Agace's testamentary bounty, had been dead long before the testator made his will; he could hardly, therefore, have had any strong feeling in favour of persons so remotely connected with him, at least so as to make it probable that he would have left this large sum to them, whose names even do not appear in these papers, in preference to the person for whom he has testified his regard and affection, by making her his residuary legatee.

A good deal of stress has been laid in argument on the latter part of this paper, in which the deceased requests his executors to transfer the property, and to divide it in conformity with the directions of his uncle's will, and it has been said that *precatory* words, or words of *request*, are as strong

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as positive and absolute bequests, where the fund to be disposed of, and the persons intended to take it, are clearly designated ; and of the truth of this position there can be no doubt, where the paper in which they occur is clearly testamentary, but it does not by any means follow, that the use of such terms will give that character to a paper to which it is not otherwise entitled.

I have not hitherto adverted to the different form in which this paper is drawn up from that of the two codicils, or to the description which is given of them.

The will and two first codicils are regularly drawn by a solicitor, and are regularly attested, which it may be said was necessary, as they related to real as well as personal property, which is true, and might, perhaps, have accounted for the paper propounded not being executed in the presence of witnesses, but the same observation will not account for the difference in the description of them ; the two executed codicils being expressly declared to be, the one a codicil, and the other a second codicil to the will of April, 1820, whereas the paper propounded, though written before either of the other codicils, has no such title given to it ; on the contrary, it is excluded in the enumeration of the codicils ; thus evidently showing that the deceased did not consider it as a part of his will, and he could not have forgotten it, as when he placed the second or last codicil with his will, as late as the month of April, 1828, shortly before his death, this paper must have presented itself to his view.

Upon the whole then, I am of opinion that the facts stated in these allegations are not sufficient to en-

title this paper to probate. I am not unaware of the importance of the interests involved in the decision of this question, or of the responsibility which I am taking upon myself in pronouncing against the validity of this paper, and in refusing probate of it; and, thereby, so far at least as this Court is concerned precluding the parties from resorting to another Court for the purpose of obtaining its opinion upon the construction of it; and I need hardly say, that I should have been glad to have been relieved from the necessity of so deciding, if I could, with propriety have declined to do so; but sitting here as judge of a Court of Probate, I am bound to form the best opinion I can as to the character of every paper, to which the sanction of its seal is sought to be obtained, and having formed my opinion to declare it without reference to the consequence which may follow from it.

In this case my opinion is, that this paper is not testamentary, and I therefore reject the allegations propounding it.

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Lushington in support of the allegation.

The *King's Advocate* contra.

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A power in a *feme covert*, to dispose of personal property by will, "to be by her signed and published in the presence of, and to be attested by two or more credible witnesses," held not to be sufficiently exercised by a writing purporting to be her will, and to be signed, but omitting to state that it was published by her in the presence of two witnesses; extrinsic evidence of the fact of publication not being admissible.

JUDGMENT.

SIR HERBERT JENNER.

The question for the decision of the Court is, whether the allegation now offered is proper to be admitted; the object of it is to propound a paper-writing as containing the last will and testament of Mrs. Grizzel Allen, which is all in her own handwriting, and is dated the 15th day of the 10th month, (that is October) 1829, and purports to have been signed by her in the presence of two witnesses, whose names are subscribed as attesting her signature to the instrument.

The deceased being a married woman, it became necessary to set forth the power under which she was entitled to make any disposition of her property by will, and accordingly the first article of the allegation pleaded an extract from the will of her former husband to the following effect: "as
" to, for, and concerning the sum of 8,000*l.*, part
" of my said residuary estate, or such trust money,
" and trusts, as aforesaid, I declare that the same
" shall be in trust for such person, or persons in
" such shares and proportions, manner, and forms,
" and to be paid and transferred at such time or
" times, as my said wife Grizzel Birkbeck by her
" last will and testament in writing, or any writing,
" or appointment in nature thereof, or any codicil or

See also *George v. Reilly* Vol 2 p. 11. & *Cooper v. Thompson*
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“ codicils thereto, *to be by her signed and published*
 “ *in the presence of, and to be attested by two or more*
 “ *credible witnesses*, shall give, bequeath, direct,
 “ or appoint the same, and in default of such
 “ gift, bequest, direction, or appointment; or in
 “ case any such shall be made, and the same shall
 “ not amount to, or be a complete appointment or
 “ disposition of the said sum of 8,000*l.*, or so
 “ much, and such part thereof only as shall not
 “ be so appointed or disposed of, as aforesaid, as
 “ the case may be, in trust for the next of kin of
 “ my said wife according to the statute of distri-
 “ bution of intestate’s effects.”

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The second article pleaded the factum of the instrument by virtue of the power just recited, and amongst other things, that the deceased did on or about the 15th of October, 1829, sign her name thereto, and did publish and declare the same as and for her last will and testament in the presence of John Capper and Thomas Binns, and other credible witnesses, and that the said John Capper and Thomas Binns then at her request, and in her presence, and in the presence of each other did attest the said will as witnesses, John Capper one of the said witnesses thereto, writing with his own hand the words, “ *witnesses to the signature of the said Griz-*
 “ *zel Allen;*” and the article concluded in the usual form.

The third article pleaded the death of the deceased, on the 15th of July, in the present year, without parent, brother, sister, uncle, or aunt, leaving Joseph Bradshaw, her nephew, and several other nephews and nieces her next of kin.

Such is the purport of the allegation which is brought in, on the part of Mr. William Allen, the

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husband of the deceased, to whom she had by the paper propounded left the remainder of the sum of 8,000*l.*, over which she had a disposing power—and the residue of her property of every description—and whom with her nephew, Samuel Hoare, she had appointed executors of her will.

The question then to be considered is, whether this will, so executed by the deceased, is a good and valid execution of the power of disposition given to her by her first husband; if it is not, the allegation must be rejected.

The case was originally brought before the Court in the shape of a motion, made on behalf of the husband; but the Court thinking that a question of this importance should not be disposed of in so informal a manner, directed that the paper should be regularly propounded which has been accordingly done, and there are now two parties appearing in the cause, Mr. Allen, the husband, and Mr. Joseph Hoare Bradshaw, the nephew of the deceased, and who will be entitled to a share of the 8,000*l.*, if the Court shall be of opinion that the power has not been duly executed, and the case has been argued with great ability by their respective counsel, who have referred the Court to several cases in support of their arguments, to which it may be necessary to advert.

The first subject for consideration, is what is required by the instrument, under which the power of disposition is given to this lady over this sum of 8,000*l.*?

The second, has she complied with what was so required of her?

Now the power of disposing of this sum is to be executed by “ *her last will and testament in writing,*

“ *or by any writing of appointment in nature thereof,*
 “ *or any codicil or codicils thereto, to be signed and*
 “ *published in the presence of, and to be attested by*
 “ *two or more credible witnesses.*” The paper propounded purports to be her *last will and testament*—it disposes of the 8,000*l.*—it is *signed by the deceased*, and appears to have been so signed *in the presence of two credible witnesses*, who have attested it; but it does not appear upon the face of the instrument itself, or the attestation clause or memorandum, that it was published in the presence of the witnesses, or that the publication was attested by them. The clause is to this effect;—this my last will and testament is written by me, Grizell Allen, and signed this 15th day of the 10th month, in the year one thousand eight hundred and twenty-nine, in presence of the undersigned witnesses; then follows in the handwriting as pleaded of Mr. Capper, “ witnesses to the signature of Grizell Allen,” John Capper, Thomas Binns; to which their residences and occupations are added.

On the face then of the instrument itself, all that purports to have been done in the presence of the witnesses, or to have been attested by them, is the *signature* of the deceased.

Nothing is said as to the publication of it, and then the question is:—

First, Whether without *publication*, as well as *signing*, the power is well executed; and secondly, if not, whether as the publication is not mentioned in the memorandum of attestation, extrinsic evidence can be received to supply the defect.

As to the first of these questions, the necessity that the instrument should be published as well as signed, it may only be necessary to observe, that if

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signing does not include publication, the act of signing will not be sufficient. (a) Sir Edward Sugden, in his elaborate work on Powers, lays it down as a general rule, "that every circumstance required to the execution of a power must be strictly complied with," which rule, as a general position, cannot be denied, nor indeed was it attempted to be controverted in argument; and which he considers as "so clear and plain" as to require no further observation; "were there not many cases in which *particular expressions* imposing restraints on powers, or the modes of executing them have received a judicial exposition."

Is then the signature of the deceased equivalent to publication?

Now this has been already decided in the negative, in the case of Moodie and Reid, (b) by Sir Thomas Plumer, and afterwards by the Court of Common Pleas, upon a case sent from him between the same parties, (c) in which the instrument was required, as in the case before the Court, to be signed and published in the presence of, and attested by two or more credible witnesses. The paper was signed in the presence of, and attested by two witnesses, and there was some evidence to the effect, that the witnesses understood at the time that the writing which they attested, was the will of the deceased. Chief Justice Gibbs says, "A will as such requires no publication—be publication what it may—a will may be good without it. But here the power is to be by a will *signed and published*, therefore there must be some pub-

(a) Sugden on Powers, ch. 5, sect. 3, of the compliance with the conditions annexed to a power, 5th edit. p. 218.

(b) 1 Maddock, 517.

(c) 7 Taunton, 355.

“*lication*; now the will must be signed, published,
 “and attested, and there must be some attestation
 “here of signing and publication.” He goes on to
 say, “Here the witnesses have attested the sign-
 “ing—the question is, have they attested the other
 “formality of publication, in attesting the signing.
 “If the act of testatrix in calling on the witnesses to
 “attest her will, be a publication of it, then their
 “attesting that she signed it, attests her publication
 “also, because they attest that by which she pub-
 “lishes it.” The result, however, was that the
 certificate returned to the Vice Chancellor was, that
 the will was not a due execution of the power.

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The case of Stanhope and Keir, (*a*) (1824) is to the same effect, the will was required to be signed, published, and attested, but it only purported to be signed by deceased in the presence of the three witnesses whose names were subscribed; it also appeared in that case, that administration with the will annexed had been granted by this Court, yet the Vice Chancellor, Sir John Leach, was of opinion that the power was not well executed, and overruled the plea.

It may then be assumed on the authority of these cases,—in the absence of any of a contrary import, and none such have been cited—that a power to dispose of property by a will signed, published, and attested, is not duly executed by a will signed and attested, unless there is some further act of publication shown than is implied by the mere act of signing, and the attestation of that act by the witnesses; as then the will here propounded does not purport on the face of it to have been published, as well as signed, in the presence of the witnesses, and

(*a*) Simons and Stuart, p. 37.

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as the clause of attestation takes no notice of the publication ; the next consideration is, whether this deficiency can be supplied by evidence, *dehors* the instrument itself. Now if this were *res integra*, the Court might possibly feel considerable difficulty in coming to a conclusion, that such evidence could not be received. But if it find the point already determined by decisions of those courts, to which questions of this kind are much more familiar than to itself, and to which they more properly belong ; it would ill become this Court to indulge in any speculation as to the probability, that those decisions might be reversed on appeal, by the highest tribunal of the country—the House of Lords. This Court is, I think, bound to follow in the course pointed out by the decisions of the different Courts of Equity, supported and confirmed by the several courts of common law.

The cases are not, perhaps, very numerous, but they are quite sufficient to establish the law, so far at least as the courts by which they have been decided can have that effect, and it may be a sufficient answer to one part of the argument urged by the learned counsel for Mr. Allen to say, that the law does not depend upon one single case, but upon several, all of one uniform tenor. It is true, indeed, that in the case of *Wright v. Wakeford*, (a) there was a difference of opinion between the judges of the Court of Common Pleas, the Lord Chief Justice Mansfield, to whose opinion great weight is due as a most learned equity lawyer, differing from the other three judges, who were also men of the greatest eminence and knowledge in their profes-

(a) 4 Taunton, p. 213 (1812).

sion ; and if that case had stood alone it might have been too much to say, that it was sufficient of itself to settle a disputed point of law.

But whatever may have been the extrajudicial opinion of other judges, or eminent writers as to the soundness of that decision, there is not to be found a single case in which a contrary decision has been pronounced ; whilst there are, as I have already said, several in which it has been followed. Now without going into the particulars of the case, the effect of the decision was, that it was necessary to the due execution of the power, first, that the consent of the parties which was required, “ should be testified by some writing under their “ hands and seals ;” and secondly, that the fact of their putting their hands and seals to such writing should be attested by two or more witnesses. And that as a question of law, the fact of signing as well as sealing, in the presence of witnesses must be stated, by the true construction of the terms of the attestation, to which, say the learned judges, “ our attention must be confined, and we do not think “ that the signature of Thomas Wood and his son, “ is comprehended in the words made use of in the “ attestation ;” and further, “ that the attestation “ required to constitute a due and effectual execution of the power, ought to make a part of the “ same transaction with the signing and sealing “ the writing, testifying the assent and approbation “ of the parties, (Thomas Wood and his son) such “ being the usual and common way of attesting the “ execution of all instruments requiring attestation.” Thus deciding as far as that Court could decide, that the observing of all the formalities required to the due execution of the power must

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appear in the clause of attestation, drawn up contemporaneously with the transaction itself; and that it could not be supplied, as was attempted in that case, by a full clause of attestation subsequently added.

This case, in 1812, appears to have been the first in which the question was solemnly argued and determined, and it was acted upon by Lord Chancellor Eldon, (*a*) who, upon receiving the certificate of the judges of the Court of Common Pleas, dismissed the bill which was for a specific performance against a purchaser. This case was followed by that of *Doe v. Peach*, (*b*) in the Court of King's Bench, Easter Term, 1814; and again in *Wright v. Barlow*, (*c*) King's Bench, Hillary Term, 1815; by *Moodie and Reid*, (*d*) already mentioned; by *Stanhope and Keir*; (*e*) by *Doe on the demise of Hotchkiss and Pope v. Pearce*, (*f*) to which it may be necessary to advert again for another purpose, and by others, all going precisely to the same effect: that that which passed at the time of the execution of the instrument must be determined by what appears in the attestation clause, and that no extrinsic evidence can be received in aid.

It has, indeed, been argued, that from the case of *Wright v. Barlow*, Lord Ellenborough appears to have been of opinion that the law was not, when that case was determined, considered to be finally settled, or he would not, as he is reported to have done, have offered to turn the case into a special verdict, so that it might come before the twelve

(*a*) 17 Ves. 454.(*b*) 2 Maule and Selwyn, 576.(*c*) 3 Maule and Selwyn, 512.(*d*) 1 Maddock, 517, and 7 Taunton, 355.(*e*) 2 Simons and Stuart.(*f*) 6 Taunton, 402.

judges, his Lordship observing, that he could not say to what decision the Court might come with the assistance of the other judges; but this offer not being accepted, a certificate was returned to the effect, that the Court was of opinion that the power was not duly and effectually executed, and the certificate was signed by Lord Ellenborough, Mr. Justice Le Blanc, and Mr. Justice Bailey; all men of great eminence, who, it must be assumed, would not have subscribed their names to such a certificate, unless they had been satisfied that the law was sufficiently settled and established to justify them in so doing; and, although it has been said that the commonly received opinion of the profession was against the principle laid down in those cases, it is somewhat remarkable that no person has yet been found sufficiently bold to venture upon taking his case to the House of Lords, in the hope of inducing that house to come to a different conclusion.

The attention of the Court has also been directed to the act of 54 Geo. 3, c. 168, which recited that doubts were entertained as to the validity of instruments required to be signed, or to be under the hands of the parties, when the word signed was omitted in the memorandum of attestation, and although the same must have been actually signed by the person whose signature was required thereto; and it was thereupon argued, that in the opinion of the legislature, the question was not considered to have been set at rest, and was still open, but it is to be observed that this act was passed in 1814 or 1815, that it is retrospective only in its enactments, and that it only provides for the omission of the word "signing," without having any re-

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ference to those cases, in which any other of the formalities required by the instrument creating the power was unnoticed in the memorandum of attestation. The act, therefore, leaves the question respecting the case now before the Court untouched, and is no authority therefore recognizing that doubtful state of the law as to the omission of "publishing" in the attestation where that is required as well as "signing."

But whatever may have been the effect of the act, the courts have proceeded in the same track as before it was passed; the act passed in 1814 or 1815. Moodie and Reid was, in 1816, in Chancery, and in 1817, in the Court of Common Pleas—Stanhope and Keir, in 1824. As far, therefore, as any question of law can be said to be settled by repeated decisions of courts of competent jurisdiction in each department of the law—by the Courts of Equity—the King's Bench and Common Pleas—without the actual decision of the final Court of Appeal, this point must be considered as too firmly established to be disturbed by any opinion which this Court can form, even if it should be presumptuous enough to differ from them.

But it has been further contended, that this Court sitting here as a Court of Probate, is not necessarily limited by the same rules as the Court of Chancery, or the common law courts; that its duty is, to ascertain the intentions of the party, and that it is not bound down to any particular mode by which it is to proceed, in order to obtain the necessary evidence for that purpose, and, consequently, that it may travel out of the memorandum of attestation and receive evidence of what did actually take place. But I cannot entirely assent to this doc-

trine, no case has been cited in support of it, and it would be somewhat extraordinary if this Court could exercise such a latitude of discretion, which is not entrusted to any other. It is undoubtedly true, that this Court is always anxious to carry the intentions of testators into effect, so far as the law will permit, but then it must first ascertain that the alleged testator has a legal capacity to make a will, before it can enquire as to the intention with which the testamentary act was executed. It cannot grant probate of the will of a married woman ; when that fact appears, without requiring the production of the instrument, under which she has acquired a privilege to which she was not before entitled, and when it is satisfied that she has the *potestas testandi*, the Court must then see that she has complied with the requisite formalities.

Formerly, indeed, the Court did not take upon itself to enter with any great minuteness into the construction of the powers under which wills of this kind were executed, or as to the due compliance with their conditions, but it seems now to be considered that the Court of Probate is bound to decide in the first instance, whether the power has been duly executed, before it gives the instrument the sanction of its seal.

If the Court felt any real doubt on the point, it might, perhaps, be the safer course to pursue, to pronounce for the validity of the paper, as in that case, the Court of Construction would not be bound to give effect to the disposition contained in it, if that Court should be of opinion that the power was not well executed, as was done in the case of Stanhope and Keir, whilst on the other hand, if this Court should reject the paper, its decision would be

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final; as the Court of Construction will not proceed to the consideration of the effect of any testamentary paper till it has been proved in the proper Ecclesiastical Court.

These considerations might, as I have said, induce the Court to incline to admit, rather than reject, a paper brought before it, with respect to which it entertained a real doubt, but cannot operate on its mind when no such doubts exists.

The case of Doe on the demise of Hotchkiss and Pope v. Pearce, (a) which has been already mentioned by the Court, in its circumstances more closely resembles the present case than any of those which have been cited, and seems to have some, perhaps not a very remote, bearing upon this part of the argument: the marginal note is, “a defective attestation of the execution of a power cannot be supplied by parol evidence of the attesting witness given on a trial.” In that case the question arose as to real property, with respect to which a power of disposition was given “by any deed or deeds, writing or writings, under hand and seal, and attested by two or more credible witnesses.” The power of disposition was attempted to be executed by will, purporting to be signed and sealed by the testator, and the attestation was in the following words; “signed in the presence of us, this 20th day of May, 1795. A. Robinson, E. Sweet, J. Byles.” An action of ejectment having been brought, the party claiming under this will, produced one of the attesting witnesses, to prove amongst other things, that the seal was affixed to the will at the time when the same was executed by the testator, and attested by the witnesses, the

(a) 6 Taunton.

other witnesses were not called, nor was any evidence given to show whether they were alive or dead, but that does not seem to have been thought material, and the question simply was, whether the omission in the attestation clause could be supplied by parol testimony. In delivering his judgment, Lord Chief Justice Gibbs said, "It is impossible to distinguish this case, from that of *Wright v. Wakeford*, which was before this Court; and my brothers, Heath and Chambre, joined in that certificate; the judgment must, therefore, be for the plaintiff for one-third part of the premises."

This case, therefore, determines that parol testimony cannot be received in an action of ejectment, to supply the deficiency in the attestation clause as to the execution of a will made in pursuance of a power; and seems, at least, to supply a principle on which this Court, as a Court of Probate, may act with safety in rejecting the same evidence in a suit respecting a will of personalty.

I have purposely abstained from noticing that part of the argument in support of this allegation, which was drawn from the inconsistency of the decisions which have been pronounced as to the admission of parol testimony, to supply defective attestations of wills and land under the statute of frauds, and those of wills executed under powers; and for this plain reason, because, however forcible those arguments might have been when the question was first mooted, it is now much too late to enter into the consideration of them, after the distinction between the two classes of cases has been so often recognized on grounds which I have no doubt were sufficiently intelligible and satisfactory to the minds of those very learned persons, by whom it was adopted and acted upon.

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I have also omitted to notice the case of *M'Queen v. Farquhar*, (a) in which the decision is supposed to be inconsistent with those cases which have been already mentioned, because there was this obvious distinction between them, that the signing of the deed, by which the power in that case was to be executed, was not required to be attested by the witnesses, though it was required to be signed in their presence; the omission therefore, in the attestation clause, to notice the act of signing was permitted to be supplied by parol testimony, simply upon the ground that the attestation of the signature was not a formality required by the instrument creating the power.

Such are the grounds upon which the Court has come to the conclusion that this will, now propounded, is not duly executed according to the conditions of the power, under which alone this lady, as far as appears to the Court, could make any testamentary disposition whatever, and as this is the first case upon this point which has come before this Court, I have thought it right to state more fully, and in more detail, than was perhaps necessary, the reasons on which my judgment is founded; it is certainly to be lamented that the clear and manifest wishes of the deceased should be thus defeated, and it is unfortunate that she did not avail herself of the assistance of her professional adviser, under whose superintendence this miscarriage of her intentions would not have occurred: but however reluctant I may be to come to such a conclusion, I feel myself bound to pronounce, that this paper cannot be supported, and I consequently reject the allegation propounding it.

(a) 11 Ves. 467.

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Addams in support of the will.

The *King's Advocate* and *Curteis* contra.

JUDGMENT.

SIR HERBERT JENNER.

Susannah Baker, the deceased, in this case, died on the 21st of April, 1834, a married woman, the wife of William Baker, party in the cause, who was her second husband, to whom she was married on the 16th of July, 1833. At the time of her marriage, she was possessed of property, which came from her first husband, to the amount of 5,000*l.*, secured on a note of Messrs. Whitbread, and also of furniture of considerable value. On her marriage, 2,500*l.* were given up to her husband, the remaining 2,500*l.* were by settlement transferred to a trustee, for her sole and separate use, during the joint lives of herself and husband; and in case of her surviving him, the principal was to be transferred to her; but in the event of Baker surviving her, the principal was to be paid to such person as she should appoint by will, attested by two witnesses, and in default of such appointment to such persons, as under the statute, for distribution of intestate's effects would have been entitled thereto, if she had died unmarried and intestate. By the settlement it was also agreed, that in the event of Mrs. Baker surviving her husband, an annuity of 150*l.* should be paid by his representatives to her for her life.

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The will of a married woman prepared by the husband's solicitor unknown to the deceased, from instructions given by the husband; he being appointed sole executor and residuary legatee; departing from the intentions of the deceased, previously expressed by her; pronounced against, and the husband condemned in costs.

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The marriage took place on the 16th of July, 1833.

On the 21st of April, 1834, Mrs. Baker died, having as alleged executed her will on the 19th of the same month, by which she purported to have executed the power reserved to her by her marriage settlement; the contents of the paper are as follow:—she gives to “her two nephews and her “niece,”—their names are not mentioned,—“the “children of her late brother, 200*l.* each.” “To “the four sons and two daughters of Mr. Beaseley, “brother-in-law of her late husband, 100*l.* each.” “To Mr. Phillips of Harrow on the Hill, father of “her first husband 100*l.*” “To Eliza Phillips, “niece of her first husband, and daughter of Mrs. “Brown, 200*l.*” “To Mr. Temprell (spelt Tem- “pler) of Anne’s Place, Hackney Road, and Mrs. “Templer 10*l.* each for mourning—the residue to “her husband, his executors and administrators, “and she appoints him sole executor.”

The paper purports to have been executed by a mark in the presence of two witnesses, a Mrs. Jane Foweraker, (sister of Mr. Baker) and Ruth Heath, who was attending deceased as nurse, who, as well as deceased, is a markswoman. It was prepared by the solicitors of the husband from instructions verbally communicated to them by him, so early as the 20th of February, though it remained unexecuted till the 19th of April. The solicitors who prepared it had no interview with the deceased, who was an uneducated woman, unable to write and scarcely if at all capable of reading. She was in a state of great debility and nearly approaching her death at the time of the alleged execution, and there is no evidence to show that she had any knowledge of

the existence of the paper. It is a case, therefore, in which the evidence in support of such an instrument requires to be narrowly watched, and in which the *onus probandi* lies very strongly on the party propounding it. From this paper it seems that the deceased had two nephews and a niece, but it turns out that only one of them, James Batt, the party in the cause, is legitimate, and who as the sole next of kin would, under the terms of the settlement, be entitled to the whole sum of 2,500*l.*, in case she had died intestate.

The history of the deceased appears to be shortly this; she was the widow of Mr. Thomas Phillips, a publican, in Blandfort Street, who died about the year 1828 or 1829. Mr. Baker had taken the public-house, formerly kept by Mr. Phillips, and it appears that some degree of intimacy had subsisted between Mr. Baker and his family, and the deceased for some years before the marriage took place. Upon her marriage, the deceased, who to that time, had continued to live in Blandford Street, went to live at Notting Hill, Kensington, where she died after an illness of some months. Mrs. Heath stating that she nursed her for thirteen weeks, and it appearing that since her marriage she was constantly ailing. What the precise age of the deceased was at the time of the marriage does not very exactly appear. Mrs. Temprell says, she was upwards of sixty years of age; Mr. Temprell, sixty or about that age; Mr. Hora, the apothecary, says, from fifty to sixty; and Mr. Gray says, upwards of fifty.

Of Mr. Baker's age there is no direct evidence, but he appears to have grown up children, one of them married, so that he could not have been a

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very young man, and Mrs. Foweraker, his sister, describes herself to be forty-eight. So that with respect to age, there probably was no such disproportion between them, as to render it very improbable that she might survive him. With respect to constitution, the difference might be greater, and render the chance of her surviving her husband more precarious.

Mrs. Temprell says, after stating that Mrs. Baker could neither read nor write, so she made her mark (to the settlement). "Poor thing! she had
" not a tooth in her head nor a hair upon it, and
" she was neither shape nor make; in short, in a
" day's march you would not find so ordinary a
" looking person, and she was upwards of sixty
" years of age;" she says, "that about six weeks
" after her marriage, she complained occasionally
" of feeling very ill, and that it seemed as if cords
" were drawn round her chest and prevented her
" breathing. Deceased had been ill I consider
" from October, the doctors called her complaint,
" disease of the heart." Mr. Temprell says, "she
" had been ailing before her marriage, but not to
" say ill, till four or five months before she died."
Mr. Gray says, "there was no probability of her
" surviving her husband as she was in ill-health at
" the time, and he should think sixty years of age."
Mrs. Heath says, that "for the first two months
" after the marriage they slept together; after that,
" on her second visit she became too ill, she at-
" tended her thirteen weeks, and understood she
" had been confined a month before."

Sarah Piper who had lived with her six years, deposes, "that she was very ailing after her mar-
" riage, and kept a good deal to her room. I

“ do not consider she was in health from the time
 “ of her marriage ;” and Mr. Hora, the apothecary,
 who was called in to attend her in December, 1833,
 says, that “ she died of effusion on the chest, but
 “ her constitution was worn out—that he has no
 “ doubt she had suffered partially from her com-
 “ plaint (dropsy) for a considerable time before he
 “ attended her, or at least had a tendency to it.”

As to Mr. Baker, he does not appear to have had
 any thing the matter with him, and since the death
 of the deceased it seems that he has married a third
 wife, (for he was a widower at the time of the mar-
 riage with deceased) and is described as a well
 looking man: from this description of the parties,
 it certainly was by no means improbable that he
 should be the longer liver, and there was little
 danger that the claim to the 150*l.* per annum
 would ever be made; he was probably the younger
 of the two, and certainly much stronger in point of
 constitution, and considering the account given of
 the deceased by Mrs. Temprell, allowing for some
 degree of exaggeration, she was by no means an
 object peculiarly attractive, and it would not, per-
 haps, be doing any very great injustice to Mr.
 Baker, to suppose that he was more influenced by
 pecuniary motives in allying himself in marriage
 to deceased, than by her personal appearance. But
 this is a part of the case, founded pretty much on
 conjecture, and to which very little attention is
 due: there must be something much more stringent
 than this to enable the Court to found any conclu-
 sion upon it, and probably the Court would not
 have adverted to it at all, but that it was dwelt
 upon by the counsel on both sides, who must there-
 fore have thought it important to the view which

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they took of the case. It is much more important to inquire, whether there is any evidence on which the Court can rely, as to the real intentions of the deceased with respect to the disposition of her property, and the alleged attempts of the husband to obtain a will from her, contrary to her wishes and intentions. It therefore becomes necessary to advert to the transactions in this case, in order to see what was the conduct of the parties; for this purpose, it may be material to consider what the situation of the parties at, and just before the time of the marriage was. Mrs. Baker was living in apartments, having, as Piper says, "a good deal of furniture of her own," which Mr. Temprell deposes, "could not be worth less than 600*l.*," and having also the sum of 5,000*l.* at her own disposal.

Mr. Baker kept wine-vaults and a public-house in Blandford Street, having a family, and being in some degree embarrassed in his affairs, at least if any credit is to be given to the accounts of Mr. Gray and Mr. and Mrs. Temprell. Mr. Temprell says, "at first, I know deceased wished to have all her property settled upon herself, but after some persuasion she gave way; and as Mr. Baker was in debt, she should not like to let him be in difficulties, and gave up 2,000*l.*, to pay what he owed to Messrs. Whitbread; but he induced me to solicit of her an additional 500*l.*, which I assented to do and obtained, though she never, I believe, liked me for it afterwards, and often spoke of my having over persuaded her in that matter; but I did so, because she had become security for her late husband's brother, Henry Phillips, for 200*l.*, and this sum Baker would have to pay; and he represented that he must

“ have a new horse and chaise ; so I suggested to
 “ her to give up that additional sum.”

Mrs. Temprell also says, “ she (deceased) spoke
 “ to me about her marriage and intended settle-
 “ ment, not what Mr. Baker was going to get from
 “ her, but what he was going to settle on her, that
 “ is, his public-house in Blandford Street. Mrs.
 “ Baker had several interviews with my husband
 “ and myself on the subject of such settlement,
 “ Mr. Baker also came ; but there seemed strange
 “ mistakes about it ; he at first explained, that in
 “ proposing to settle the house upon her, he ex-
 “ pected her to come to work in it, and that she
 “ would also settle on him the 5,000*l.* ; when this
 “ was explained to her, she was near giving up the
 “ marriage altogether, but it had got spread abroad,
 “ and she partly by his persuasion, and partly
 “ through the influence of my husband, consented
 “ to settle part of the money on him ; it turned
 “ out that he was in debt to the amount of 2,000*l.*
 “ to Messrs. Whitbread, and this sum she con-
 “ sented to pay off for him ; and then he talked
 “ a great deal about her giving 500*l.* more, he said
 “ she had put herself under an engagement to her
 “ husband’s brother, which her husband would
 “ have to pay, and then she would not sit behind
 “ the horse he had, and he must get a new one ;
 “ and he should like to have a hundred pound or
 “ two in his pocket, in case he saw a cottage that
 “ they liked, and Mr. Temprell, in consenting to
 “ propose this to her, said, as I well recollect, ‘ If
 “ ‘ I do this Mr. Baker, you won’t ask for any
 “ ‘ thing more ; he answered no ! indeed he should
 “ ‘ be quite satisfied, and instead of wishing for
 “ ‘ any more, he should wish that the rest should

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“ ‘ go to her relations and the family of her late
 “ ‘ husband, as was well known to be her inten-
 “ ‘ tions.’ ”

Now if this account be true, there can be no doubt that Mr. Baker was at this time in embarrassed circumstances, and that he looked to deceased's property as the means to extricate himself from them. In some parts of this account, indeed, there is room neither for corroboration nor contradiction, as the circumstances occurred between these parties only, but in others not so; was Mr. Baker indebted 2,000*l.* to Messrs. Whitbread? was this sum paid off with deceased's money? if not, this might have been pleaded and proved. If the fact were as stated, then the story is corroborated; and Mr. Baker's conduct was not quite so disinterested as is suggested, and he certainly showed no want of anxiety to promote his own advantage; and if the statements of Mr. Gray and Mr. and Mrs. Temprell are entitled to credit, he was not very scrupulous as to the means by which his object was to be accomplished.

The Court forbears entering into the particulars of what is stated to have passed during the preparation of the settlement, and of the communications and proposals said to have been made at that time, and subsequently to Mr. Gray and Mr. Temprell by Baker, with a view to obtain the possession of the whole of the property of the deceased, because some very strong observations have been made upon the conduct of those individuals, and the manner in which they have given their evidence; and, because, although the Court is by no means prepared to go the whole length of imputing wilful and corrupt perjury to them, there are some

parts of their testimony which are inconsistent and irreconcilable with each other, and it would, therefore, be improper to hold that Mr. Baker was guilty of what was imputed to him by them; to the evidence, therefore, of these two witnesses, the Court is not inclined to pay much attention, at least not to rely upon it for the purpose of fixing these imputations upon Baker. The objection does not apply to the evidence of Mrs. Temprell, at the same time it is manifest that she was no friend to Baker, and she disapproved of deceased's marriage with him, and acted together with her husband and Gray, in endeavouring to induce deceased to execute a will under which he was not to take any interest; against this, however, it is to be observed, that she was the most intimate and confidential friend of deceased, (a) and was, therefore, a person to whom it was natural that the deceased should resort for advice, in the disposition of her property, and in any difficulty with which she might have to contend: but still the Court will not rely upon her evidence further than as she is confirmed by others, and by the necessary course of the transactions to which she deposes, or as her account is admitted to be and argued upon as being correct. With these observations on the character of the evidence, the Court passes to the consideration of the only important question in this case; namely, whether this paper which is now propounded, is proved by evidence upon which the Court can rely to be the will of the deceased; and this will depend upon the degree of credit, which the Court is to give to the evidence of Mrs. Foweraker and Mrs. Heath,

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for I entirely agree with the observation which has been made, that if the whole of their evidence is to be taken as true, there is an end of the whole case; for they not only prove the act of execution, and knowledge of the contents, but activity and volition in an extraordinary degree, so much so as to render it a matter of some difficulty to conjecture why the execution of this instrument was so long delayed. But the effect of their evidence cannot be duly estimated without examining the previous testamentary acts attributed to the deceased, as compared with that which is now propounded; the contents of which having been already stated it is not necessary to repeat.

It appears then, that the deceased having married in the month of July, 1833, and having reserved to herself the disposal of a moiety of the property which she possessed, or in the event of her making no disposition, secured it to her next of kin, her nephew, Mr. James Batt, not long after her marriage, contemplated a testamentary disposition of her property, and it is abundantly proved, and indeed admitted, that she was desirous of having a will executed, to what effect will presently appear.

In the month of November, 1833, it is alleged, that she gave directions to her husband to get a will prepared for her, and that he in pursuance of those directions, proceeded to Messrs. Poole and Gamlen, of Grays' Inn, who had been employed as his solicitors, and gave them verbal instructions for the preparation for a will to be executed by the deceased, nothing being produced to them in writing; the deceased, indeed, as before observed, is admitted to have been at all times incapable of writing. The

instructions are taken down in writing by Mr. Gamlen, and a draft will is prepared, whether a fair copy for execution was ever made appears to be doubtful, although the impression upon Mr. Gamlen's mind is, that it was, still as there is no charge for it in his books, he declines to swear to it positively; and, perhaps, the circumstance is not of sufficient importance to make it necessary to pursue the inquiry further. The instructions, however, are complete, and are so considered by Mr. Gamlen, for he draws a will from them and produces the original instructions and the draft, and they are annexed to his deposition, and are marked No. 1, and purport to have been given on the 23rd of November, 1833: The husband is appointed sole executor and residuary legatee; the amount of the pecuniary legacies is about 1,800*l.*, leaving, therefore, a balance of 1,700*l.*, subject to the funeral expenses, to the husband, besides any savings which might have accrued during the life of the deceased.

Now it is admitted that there is no direct proof of the instructions for this paper having come from the deceased; but it is said that the inference that they did is as strong as positive proof. It then becomes necessary to look at the evidence of Mr. Gamlen upon this point; now that Mr. Gamlen had no communication with the deceased is admitted, all his information comes from Baker himself, the person principally benefited by the proposed disposition. It is said that if Baker had any purpose of fraud, he would not have had recourse to this respectable house, and it is therefore to be taken as a proof of *bonâ fides* that he does apply to them, but this is an inference to which the Court cannot

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altogether accede, when it considers the means which were taken to prevent them from having communication with the deceased, and to blind them, or rather Mr. Gamlen, as to her real state and condition. Had Mr. Gamlen been taken to Notting Hill, to have attended the execution of this, or of either of the other papers prepared by him, the case might have borne out the inference, and the Court would have had the satisfaction of having the testimony of Mr. Gamlen upon the accuracy of which it might with the greatest confidence rely. But the case is not so, Mr. Gamlen does not see the deceased, and his offer to attend her is declined: his evidence to this part of the case is on the second Article; he says, that “ he “ had no acquaintance with the deceased, but had “ known her husband about three years, he having “ been recommended to his firm about that period “ to transact some business, by a client of theirs in “ the country.” To the thirty-fourth Interrogatory, he says, “ he never saw the settlement, though “ he asked for it, but Baker said there would be a “ difficulty in obtaining it from the trustee.” He says to the thirty-fifth Interrogatory, when speaking as to a subsequent will prepared for deceased in the month of February following, being that which is now propounded, with some alterations, that, “ he “ was informed by Baker that his wife was unable “ to write, not that she could not read. He re- “ presented her inability to write as owing to some “ bodily infirmity, and deponent had not the “ slightest idea but that she was perfectly capable, “ had she been well, of reading and writing too, “ and that she was a highly respectable woman ;” he says, “ Mr. Baker is a very respectable, good

“ looking man, and deponent was not aware but
 “ that he had been long married to Mrs. Baker,
 “ and that she was an educated woman ; the rea-
 “ son why he wrote in the attestation to the will,
 “ that the same had been read over to the deceased,
 “ who appeared to understand the same, and the
 “ words, the mark of Susannah Baker at the foot
 “ thereof was, because he considered that as
 “ the deceased could not write, it was necessary
 “ to have the usual clause of attestation for a
 “ markswoman ; certainly the producent (Baker)
 “ did not, on giving him instructions, inform him
 “ that his wife could not read, but only that she
 “ was unable to write, and that by reason only of
 “ some bodily infirmity.” This Interrogatory is
 addressed to Mr. Gamlen, with reference to the
 paper propounded ; but it is clear that the same in-
 formation as to the deceased’s inability to write,
 and the cause of it, must have been given to Mr.
 Gamlen on the first interview, as the attestation
 clause on the draft will has the words interlined ;
 “ the same having been read to her, and she ap-
 “ pearing to understand the same.” To the thirty-
 sixth Interrogatory, he says, “ Mr. Baker described
 “ the relations who were to have the first legacies,
 “ not by name, but by relationship, as the two
 “ nephews and niece of her late brother, as I told
 “ him that I must have their names ; I asked him
 “ for them, he said he did not know their names,
 “ and I remember *I particularly desired him to*
 “ *ask Mrs. Baker for their names, but he did not*
 “ *obtain them.*” Such then is the account of Mr.
 Gamlen, as to the manner in which the instructions
 for the first testamentary act of the deceased were
 given to him, and I cannot but think, that it is any

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thing but creditable to Mr. Baker, and certainly does not at all satisfy me, that the instructions came from the deceased herself, or that they were communicated to her.

The disposition is greatly in favour of Mr. Baker, not, perhaps, apparently so to Mr. Gamlen, who was totally unacquainted with the previous history of these parties, or the amount of property which had been given up to Mr. Baker on the marriage, or the manner in which the remaining part of it was to go, in the event of the deceased making no disposition of it: on the contrary, he seems to have thought, that the legacies were so much deducted from that to which the husband would have been entitled; indeed he expressly says, in answer to the same Interrogatory, (thirty-sixth) “ that the instructions for the will appeared to his (Baker’s) prejudice in great part, by the legacies left to relations, and in the second will more so than the first;” so that in the representation made to him by Baker, there was nothing to awaken his suspicion as to the integrity of the transaction, and he, therefore, had no difficulty in preparing the will from the instructions of Baker, without ascertaining the wishes of the deceased from herself: but had Baker told him, that he had already received 2,500*l.* from deceased, that if no disposition was made of the remaining 2,500*l.*, it would go to his wife’s relations in exclusion of himself; and that, therefore, whatever remained after the legacies were paid, would be so much clear gain to him; and above all, had Mr. Gamlen been informed that the deceased’s inability to write was not occasioned by bodily infirmity, but by ignorance, and that if she could read at all, it was with the

greatest difficulty, I am quite sure that Mr. Gamlen would not have prepared such a will as this without having seen the deceased, and ascertained that it was consistent with her intentions and wishes. But, again, how is the inference borne out, that the instructions for this will must have come from the deceased herself, when this circumstance is adverted to, that at no time does Mr. Baker appear to have applied to the deceased for the names of her nephews and niece, although expressly requested by Mr. Gamlen to do so; their names nowhere appear in any of the papers prepared by Mr. Gamlen; had he, as he must have done if he received the instructions from the deceased, communicated to her what had passed between him and Mr. Gamlen, he must have been put in possession of the names of these legatees, and have informed Mr. Gamlen of them, at the subsequent interviews. Again, could there have been any doubt, that if these instructions had proceeded from the deceased, and she had been anxious to have them carried into effect, there could have been no difficulty in obtaining a copy of the settlement from Mr. Temprell upon an application from her, through Mr. Gamlen? But no application is made, and Mr. Gamlen is directed to make the best will he could without seeing the settlement, which he accordingly does, in general terms only referring to it, and without any knowledge of its provisions, further than that the deceased had 2,500*l.* to dispose of.

Now all these circumstances taken together, so far from implying any knowledge of these instructions on the part of the deceased, to my mind convey a directly contrary inference, and satisfy me

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that this was the act of Mr. Baker alone. But this inference is still more strongly supported by what was passing in another quarter about the same time; annexed to Mr. Baker's affidavit as to scripts, are several paper writings, purporting to be instructions for a will, and the draft and fair copy of a will prepared for execution by the deceased, containing a very different disposition of her property from that contained in the paper which the Court has just been considering.

The instructions as originally taken are in the handwriting of Mrs. Temprell, afterwards altered by Mr. Gray, by whom the fair copy for execution was also prepared.

These instructions are represented to have been given in the first instance by the deceased to Mrs. Temprell, by her communicated to her husband, and afterwards delivered to Mr. Gray, who attended the deceased, and received her final instructions for the will drawn from them, but which was never executed.

Nothing can be more natural than the manner in which the instructions are given, or bear more clearly the marks of fixed intention at the time. (a) That deceased did give instructions to Mrs. Temprell is admitted, though it is suggested that they were obtained by misrepresentation and undue influence, without, however, any evidence to lead to such a supposition, except a declaration said to have come from the deceased at a late period of time, spoken to by Heath, and which it may be necessary hereafter to notice; and that the deceased knew that a will was prepared by Mr. Gray, and

(a) Evidence of Mrs. Temprell in the 5th Article.

that it remained in his possession up to the time immediately before her decease, is evident from the declaration which she made to Mr. Brown, on the 14th of April, 1834, although she said it wanted alteration.

Now that the deceased should have contemplated such inconsistent dispositions at this time, as are evidenced by these papers, is, I think, one of the most improbable suggestions that can be conceived ; and it is almost equally so, that she should have meant to mislead her most intimate and confidential friend, Mrs. Temprell, in this respect ; and if the Court is to say which of them is the true index of the deceased's mind at the time, it can have no difficulty in saying that it is the instrument prepared by Mr. Gray. The disposition is natural, it provides for those whom she considered to have claims upon her, either by their relationship to herself, or to her first husband, or from the terms of friendship on which she had lived with them. It does not altogether pass by the members of the family of her husband, Mr. Baker, from whom she had received attention, for under the instructions as originally taken legacies were left to the two sons of Mr. Baker, and her clothes, which Heath says, she declared an intention of leaving to Miss Sarah Baker, are given to her ; and in the will as finally altered for execution, the legacies originally intended for the sons of Mr. Baker, are given to Miss Sarah Baker, who seems to have been a favourite of the deceased ; and that deceased should have applied to Mrs. Temprell for advice, and afterwards have employed Mr. Gray, is extremely natural from the relative connexion of the parties with each other ; Mrs. Temprell being at this time,

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at least, her most confidential friend, and Mr. Gray the person who had prepared her marriage settlement for her. Looking then to the contents of this paper, emanating as I think they are clearly shown to have done from the deceased herself, and coupling them with the account given by Mr. Gamlen, and the conduct of Baker, there is in my mind the strongest reason to presume that the deceased had no knowledge whatever of the preparation of the draft will prepared by Gamlen, or that she ever had an intention of making such a disposition of her property as is contained in it, at all events there is no proof that she had.

The Court has dwelt longer on this part of the case than its immediate connexion with the real question perhaps required; because as this paper is the foundation of all that subsequently follows, as it forms the substratum of the will now propounded, it seemed necessary to trace as accurately as possible, the workings of the deceased's mind through the several stages of these transactions, and the conduct of the parties concerned in them, and because, if Mr. Baker is found to have commenced in fraud, it will raise the vigilance of the Court and make it observe his subsequent conduct with jealousy.

Nothing further appears to have been done with respect to the first paper of the 23rd of November, 1833; nor does Mr. Baker seem to have had any further interview with Mr. Gamlen till the 20th of February, 1834.

It was said, if the deceased had finally made up her mind to execute this paper, why did it remain in its present unfinished state?—to this it is replied, that she was deterred by fear of her husband,

who had been worretting her to make a will in his favour; to this it is rejoined, this cannot have been the true motive, for Baker went into Devonshire about the 1st of January, and returned about the middle of February; during that time there certainly was sufficient opportunity as far, at least, as any interference on his part could have prevented it, to have had the will prepared by Mr. Gray executed. It does appear, that in the month of December, an appointment had been made for the execution of it, but which did not take place, in consequence as it is said of the fear entertained by the deceased that her husband should know of it, and from that time she never left her house, and Mr. and Mrs. Temprell seem to have had very little intercourse with her during her husband's absence, in consequence of a slanderous report which he had spread that they had procured her signature to a will at a time when she was in a state of incapacity, produced by something which they had administered to her. The existence of this report is not denied, indeed, it was said in argument that there was sufficient ground for it, although in the absence of all evidence to support it; and the ground for it being disproved by the fact that no such paper was executed. Mr. and Mrs. Temprell, therefore, were prudent in not attempting to procure the execution of the will in Mr. Baker's absence.

The next act of a testamentary nature is that which occurs on the 20th of February, when Mr. Baker again goes to Mr. Gamlen, and gives instructions as from his wife for an alteration of the draft will formerly prepared; and upon this occasion, the same communication takes place between Mr. Gamlen and Baker as before, the former has no

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further information as to deceased's inability to write, the names of the nephews and niece are not communicated to Mr. Gamlen, and finding that the interest which Baker would take under this second paper, was less than under the first, he suspects no imposition, and accordingly prepares a fair copy for execution which he delivers to Baker. Mr. Gamlen says, (a) "that at this interview he offered "to go and see Mrs. Baker," but Baker said, "*there was no occasion for it.*" Mr. Gamlen then was equally ignorant as to the real state of the deceased, as on the former occasion; he has no suspicion, for he conceives the disposition of the property is prejudicial to Mr. Baker's interests, and he is led to believe that in declining his attendance upon the deceased, Mr. Baker is only actuated by a desire to avoid expense—whether that was his real motive may be doubtful. Now this paper remains unexecuted from the 20th of February to the 19th of April; why, does not very satisfactorily appear. But between these two periods several circumstances occur, to which it will be necessary now to advert, whether anything passed between Baker and his wife relative to this paper, or the former, there is no evidence to show; but it seems that on the 27th of March, Mrs. Temprell goes to the deceased's house, at Notting Hill; her illness had much increased, and she was confined to her bedroom, her strength gradually declining. Mrs. Temprell speaks to what passed on this visit in her deposition on the ninth Article, and I refer to her account of this visit with the greater confidence, because she is in some degree confirmed in it by

(a) To the 3rd Article.

Heath and Piper adverse witnesses, who admit that she was there and had an interview with the deceased, and told them for what purpose she had come, and also because she deposes to many circumstances in which, if she has spoken falsely, she was open to contradiction by other persons. She states then, that she was fetched on the 27th of March, the day before Good Friday, by Mrs. Brown, who came for her and urged her to go to deceased to induce her to sign her will; Mrs. Brown, she says, at this time knew that there was a will prepared, for Mr. Temprell in order to convince Mrs. Brown and her husband that Baker's charge about the poison was false, had shown them the will unsigned, and Mrs. Brown urged her to get the will signed; Mrs. Temprell at first objected, as she had a legacy of 100*l.* in it, but at length yielded to Mrs. Brown's persuasion and went to deceased. Now is this part of the story true or false, if false, Mrs. Brown was capable of contradicting the whole of it; she is not produced, and I must therefore presume that she could not deny that all this had passed; then, if it is true, it shows that there was nothing clandestine in it; and that the fact of the will having been prepared, and that Mrs. Temprell had a legacy of 100*l.* in it was known to Mrs. Brown, and that the will was unsigned; and it further shows that the deceased's confidence in Mrs. Temprell was not at this time diminished—indeed Piper states in answer to the fifth Interrogatory, “ Mrs. Heath might say, though “ she does not recollect that she did, that she was “ glad that Mrs. Temprell was come, for Mrs. “ Temprell was deceased's very particular friend; ” and to the tenth Interrogatory, “ that deceased

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“ always spoke of Mr. and Mrs. Temprell in terms
“ of the greatest respect and friendship, and that
“ having few friends, Mr. and Mrs. Temprell were
“ the persons she was most intimate with.” The
deceased then, on this occasion, expressed her ap-
probation of the contents of the will, and her anxiety
to sign it, but was alarmed at the difficulty of doing
it without Baker’s knowledge, and proposed that it
should be done without witnesses ; that she seemed
very anxious about, and asked whether Mrs. Temp-
rell could not come the next day ; but that being
Good Friday, it was arranged that Mrs. Temprell
should come on Saturday the 29th, and in the
mean time that Mrs. Temprell should consult Mr.
Gray as to the necessity of the presence of the wit-
nesses at the execution ; that certain alterations
should be made, namely, by taking away the
legacies of 50*l.* each to Baker’s two sons and giving
them to his daughter Sarah, who had been very
attentive to her, and 10*l.* to nurse Heath, and 10*l.*
to Sarah Piper. She then takes her leave of de-
ceased and returns to town, where she sees Gray,
informs him of what had passed and of the altera-
tions proposed, which were accordingly made, and
it was then settled that Gray and Webb who had
witnessed the execution of the marriage settlement
should accompany Mrs. Temprell to Notting Hill
for the purpose of getting the will executed, if it
could be so arranged as to be kept secret from
Baker, of whose knowing it, Mrs. Baker seemed to
have great dread and apprehension.

On the 29th of March, Mrs. Temprell, Gray,
and Webb proceed to Notting Hill ; Mrs. Temprell
goes to the deceased alone, and endeavours to pre-
vail upon her to execute the will, but deceased

refuses, under the apprehension as she declares that her husband will know of it; and when she finds that the witnesses are in the house, she becomes greatly alarmed and agitated, and desires that they should go away immediately, which they do; and Mrs. Temprell, after expressing some anger at the deceased for having given her the trouble of coming to her for no purpose, also takes her leave. Such is shortly the history of what passed on the 29th of March, on the subject of the execution of this will, and in which the deceased again expresses her approbation of its contents, and her determination to execute it, although she does not then proceed to do so, alleging that whatever measures might be taken to ensure secrecy, her husband would be sure to discover it.

The next transaction which it is necessary to notice is that which occurs on the 8th of April. It will be recollected, that on the 20th of February, a fair copy prepared for execution, being, in fact, the paper now propounded, but in its original form, was delivered by Mr. Gamlen to Baker, and it is pleaded that it was then given to deceased, in whose possession it continued, it having been deposited in one of her drawers in her bedroom, and where it remained from that time in the same state in which it had been prepared by Mr. Gamlen; although the paper which is much worn does not bear that appearance, it looks much more as if it had been carried about in the pocket, and it appears to have seen some service.

On the 8th of April, Baker again goes to Mr. Gamlen and gives him instructions for a new will. The account which he gives is on the fourth article of the allegation. Instructions were given and a

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fair copy prepared for execution, which, however, remained in Mr. Gamlen's possession till the 14th of April, when it was given to Mr. Brown under the circumstances which will be presently stated.

The contents of this paper are very different from any of those which had been already prepared; in all of those, the legacies were to be paid on the deceased's death; but, by the present, they were to be postponed till Baker's death, he in the mean time having the interest of the whole, so that the advantage intended for deceased's relations and friends was to be postponed to a period which might be sufficiently distant.

That any thing of this kind should have occurred to the deceased herself is very improbable, and is not to be presumed from what she is previously said to have done; at what time she began to entertain this notion there is nothing to show, nor are there any expressions coming from her which tend to support the suggestion, that the idea originated with or was adopted by her; on the contrary, if Heath is to be believed, the suggestion was Baker's, and was not acceded to by her; she says, "the deceased told her that Baker wanted her to leave him the whole property while he lived, and that then there would be more for the others afterwards; but," she continued, "they will all expect something at my death, and they'll be better pleased to have something now, for they do all want it, and they can go into business with it."

If then this account be true, the deceased and Baker entertained different opinions as to the propriety of the disposition of her property; and it affords, therefore, no ground for inferring that she

desired her husband to get a will prepared to that effect: and in the absence of all evidence, this is decidedly not a case in which Mr. Baker is entitled to any presumption in his favour. From the instructions then given a will is prepared for execution, but remains with Mr. Gamlen till the 14th of April, for on that day it is pleaded, that Mr. Brown called at Mr. Gamlen's office for it, and that it was delivered to him for the purpose of getting it executed by deceased. This brings the case then to the last week of the deceased's existence, and as there are many important circumstances which take place in this short interval which will require to be noticed, it may be necessary to consider what was the deceased's condition at this time, and what was the state in which her supposed testamentary acts stood.

She had been gradually declining in strength and was in a state of great debility—as stated by Hora—confined to her bed, suffering great oppression on her chest, with difficulty of breathing, but retaining the use of her faculties, although at times wandering a little, from the effect as it is said of the medicines administered to her, and some times perhaps labouring under some degree of stupor, from which however, when roused she recovered, and it is admitted on all hands that as far as capacity is concerned, she was in a condition to execute any testamentary act, if she were disposed so to do.

At this time she had, according to Mr. Baker's allegation, the will prepared for execution on the 20th of February, in her possession: the will also of November, 1833, she knew to be in Gray's possession; if she had been consulted at all upon the

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subject, she knew that the will of the 8th of April was prepared, or in a state of preparation ; that she had up to this time made any allusion to any of the papers for which Baker had given instructions, is not stated by any witness ; neither to Mr. Hora, who had several times urged her to make her will, having been requested by Baker to press her to settle her affairs, though not as he says to make a will in his favour ; nor to Heath who had been her constant attendant for thirteen weeks, had she uttered a syllable concerning her will, except, indeed, upon that occasion, on the 27th of March before alluded to, when she observed that she hoped Mrs. Temprell would not come again, that the will was not her's, but Mrs. Temprell's ; and to Piper she seems to have been equally reserved.

Upon the 14th day, then of April, just one week before her death, Mr. Baker's son, Robert Baker, called upon Mr. Brown and told him that Mrs. Baker wished to see him, that she was very bad and wished to see him about her will ; evidently, therefore, leading Brown to understand that he was sent for by deceased's special direction ; he consented to go, but says they first went to Mr. Gamlen's chambers for the will, which he delivered to them, having first given Mr. Brown instructions as to the manner in which it was to be executed, at which Mr. Brown says he felt disappointed, as he thought the solicitor was to go with him ; but this formed no part of Baker's plan. In their way to the deceased's, Mr. Brown read the will, and finding that the interest of the money was bequeathed to Baker for life, and that after his death, and not before the legacies which she had left, were to be paid to her poor nephews and niece ; he told Mr.

Robert Baker, that he would have nothing to do with getting such a will as that signed by the deceased, that "he was sure the deceased never intended to execute such a will as that."

As they approached the deceased's house, they were met by Baker, who told them that the deceased had altered her mind, and she meant to give what she gave to her nephews and niece, at her death and not at his; Brown told him he was glad of it, but that he had got the will in his pocket; Baker replied that it was of no use, as she had altered her mind, but as he was so near he might as well go on, as she would be very glad to see him; and in answer to the twentieth Interrogatory, Brown says, "he told Baker that if the will he had with him was her will, she must get some one else to read it to her, for he would not as he did not think it could be her intention." This pretty plainly speaks what Mr. Brown's opinion of the transaction was, and even after the death of the deceased, when there was a suggestion of ending the dispute as to the will by compromise, he entertains the same opinion as to Baker's conduct; when it was proposed to give Baker a few hundreds and the rest to her poor relations, he assents to the proposition, adding, (to the sixteenth Interrogatory,) "that the impression on his mind was, that Baker in getting what he did of deceased's money on her marriage had had as much as he ought, and that the poor relations ought to have the rest." Mr. Brown went to the deceased and had some conversation with her, but does not mention that he had the will with him.

Now it was argued that the circumstance of Baker having asked Brown to go on to the deceased, is a

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that this was the act of Mr. Baker alone. But this inference is still more strongly supported by what was passing in another quarter about the same time; annexed to Mr. Baker's affidavit as to scripts, are several paper writings, purporting to be instructions for a will, and the draft and fair copy of a will prepared for execution by the deceased, containing a very different disposition of her property from that contained in the paper which the Court has just been considering.

The instructions as originally taken are in the handwriting of Mrs. Temprell, afterwards altered by Mr. Gray, by whom the fair copy for execution was also prepared.

These instructions are represented to have been given in the first instance by the deceased to Mrs. Temprell, by her communicated to her husband, and afterwards delivered to Mr. Gray, who attended the deceased, and received her final instructions for the will drawn from them, but which was never executed.

Nothing can be more natural than the manner in which the instructions are given, or bear more clearly the marks of fixed intention at the time. (a) That deceased did give instructions to Mrs. Temprell is admitted, though it is suggested that they were obtained by misrepresentation and undue influence, without, however, any evidence to lead to such a supposition, except a declaration said to have come from the deceased at a late period of time, spoken to by Heath, and which it may be necessary hereafter to notice; and that the deceased knew that a will was prepared by Mr. Gray, and

(a) Evidence of Mrs. Temprell in the 5th Article.

that it remained in his possession up to the time immediately before her decease, is evident from the declaration which she made to Mr. Brown, on the 14th of April, 1834, although she said it wanted alteration.

Now that the deceased should have contemplated such inconsistent dispositions at this time, as are evidenced by these papers, is, I think, one of the most improbable suggestions that can be conceived; and it is almost equally so, that she should have meant to mislead her most intimate and confidential friend, Mrs. Temprell, in this respect; and if the Court is to say which of them is the true index of the deceased's mind at the time, it can have no difficulty in saying that it is the instrument prepared by Mr. Gray. The disposition is natural, it provides for those whom she considered to have claims upon her, either by their relationship to herself, or to her first husband, or from the terms of friendship on which she had lived with them. It does not altogether pass by the members of the family of her husband, Mr. Baker, from whom she had received attention, for under the instructions as originally taken legacies were left to the two sons of Mr. Baker, and her clothes, which Heath says, she declared an intention of leaving to Miss Sarah Baker, are given to her; and in the will as finally altered for execution, the legacies originally intended for the sons of Mr. Baker, are given to Miss Sarah Baker, who seems to have been a favourite of the deceased; and that deceased should have applied to Mrs. Temprell for advice, and afterwards have employed Mr. Gray, is extremely natural from the relative connexion of the parties with each other; Mrs. Temprell being at this time,

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proof of fairness on his part, and that he had nothing to conceal, otherwise he would not have applied to Brown; but the Court does not think that much can be made of that circumstance, for that Baker was anxious to get a will executed by deceased, and that under those which he had caused to be prepared he had a considerable benefit, is abundantly clear; and it is, therefore, probable that he had been endeavouring, though without effect, to induce the deceased to sign a paper to the effect of that which had been drawn up by Gamlen; for that some conversation had passed between her and Baker on the subject of her will is evident, from her manner of addressing Brown, as described by him in answer to the twenty-second Interrogatory; he says, "she expressed pleasure not surprise at seeing him, and broke out at once on the subject of her will; 'she hoped he had not come to bore her about that,' he at once told her he had not, 'she had been bored enough about it already;'" evidently alluding to something that had recently passed, and not as Mr. Brown seems to imagine to what had occurred between her and Mrs. Temprell on the 27th of March, more than a fortnight before; and from his answers to the nineteenth Interrogatory, it should seem that deceased had complained to Mrs. Brown, that Baker and all his family had been teasing and worrying her to make a will, but that it was of no use; although this might have happened, as he says, sometime before when the deceased attended Dr. Rees if so, it seems to corroborate what is stated by Mrs. Temprell and others, of Baker's urgency to obtain a will from her.

On this occasion she makes no allusion to any

will which had been prepared for her through Baker, nor indeed to any will but that which was in Gray's hands, and which she recognised as containing, in substance, her will, though she says it required several alterations, and she tells Mr. Brown when she is better, she will call upon him and pay Gray for his trouble, get the will from him, and go with Brown to some lawyers to make the alterations. So far then from having at this time, 14th of April, an intention of executing the will of the 20th of February, she says nothing from which it can be inferred that she knew of its existence.

Mr. Brown then takes his leave of her under the impression, certainly that at this time she did not entertain any intention to make a disposition of her property in favour of Baker, or that she had any other paper of a testamentary nature than that which she said was in the possession of Mr. Gray.

Now it has been suggested that from all that passed on this occasion, it is to be collected that the deceased did not conceive herself to be in danger, that she only complained of shortness of breath, and thought she should soon be better; and therefore, and on that account alone postponed the execution of her will; but this, considering all the circumstances, seems hardly possible; she had been long confined to her bed, so that it is difficult to conceive that she should have so far deceived herself as to her real state, particularly after Mr. Hora had stated to her the necessity of settling her affairs, and she could only have made use of the expressions attributed to her, with the view of inducing Mr. Brown not to enter upon the subject of her will at that time, and nothing further than what has

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been alluded to, passed between them. If she was sincere in what she said to Mr. Brown about the will in Gray's hands, she seems to have had no intention of executing it in the form in which it then was, though she might adhere to the substance of it; but if not, then she might wish to avoid importunity upon the subject, but certainly it will not warrant an inference that she was contemplating the execution of the paper of the 20th of February; and yet, according to Heath, she had on the morning of this very day, held a long conversation with her as to the manner in which she meant to dispose of her property, in the course of which she is represented to have declared her intentions almost in direct conformity with that instrument; certainly when Mr. Baker left her on that morning, he had no idea that she had any such intentions; he intimates nothing of the kind to Brown when he meets him, beyond saying that she had altered her mind and meant to give what she intended for her poor relations, to them at her death and not at his; whether any such intention was expressed to him by the deceased, there may be considerable doubt, his conduct does not seem consistent with such a supposition, for on going to London he calls upon Gray and Temprell and has a conversation with them, the particulars of which for reasons before assigned it is not necessary to state, further than that it is evident that at this time he had no expectation or idea that the deceased had it in contemplation to execute any testamentary act.

After having seen them, he has also an interview with Mrs. Temprell, what passed between them is stated by Mrs. Temprell on the thirteenth Article, of the allegation, and this appears to have been the

first time of their meeting since December, 1833, when the report before referred to had been set about by Baker; Mrs. Temprell says in allusion to this circumstance, that “ Baker seemed at first “ very confused and awkward, and said he would “ give a hundred pounds to any one who would “ make out that he had said so;” and after some short conversation on that subject, she goes on to state what he said to her, and which it is right to give in the words of the witness (on the thirteenth Article). “ He pressed me very much to go and “ speak to his wife, he said he understood there “ was a will but it was not signed, I told him it “ was as he supposed, but I had promised her not “ to trouble her again on that subject. ‘ Oh,’ he “ said, ‘ he did not want me to ask her, her wanted “ ‘ to ask me, her wished to sign her will;’ I said “ that altered the case, and he then from him- “ self pressed me to go, and said if I would, he “ would come up and fetch me in his chaise next “ day, he said, ‘ her was very bad, her was a dying “ ‘ and could not live many days.’ I told him it “ was not of much matter to him whether she “ signed the will or not, for she had left the great- “ est part of her property to her own relations, I “ said as much as 1,760*l.*, and that there was 50*l.* “ a piece to the Beasleys, and 100*l.* to Miss Brown, “ and she had left me 100*l.*; but I said there was “ a something for his family, I did not tell him “ how much, I said if she don’t sign it her rela- “ tions will get it, and if she does it won’t make “ much difference to you; ‘ well,’ he said, ‘ let it “ ‘ be how it would he wished it done;’ and as he “ buttoned his coat to go, he said, ‘ If her don’t “ ‘ leave me some of her money, I don’t think I’ll

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“ ‘ order her funeral, still,’ he said, ‘ no matter he
“ ‘ wished it signed,’ and if I would come and talk
“ with her he should be very much obliged, and so
“ at last I promised.”

Now this communication with Mrs. Temprell is of great importance. It shows not only that Mr. Baker himself was extremely anxious to have a will executed by the deceased, and that he despaired of being able to effect it by his own influence with her; but it proves also, that in his opinion the deceased's confidence in Mrs. Temprell continued unabated, and it also proves that at this time he was acquainted with the contents of the will prepared for the deceased by Gray, and that it was unsigned at this time. Now it is admitted that this interview did take place, and it has been argued upon as showing the disinterested character of Baker's anxiety for the execution of the will, inasmuch as although he was aware that the contents of the will which Mrs. Temprell had referred to were unfavourable to him, he still continues desirous that she should go to deceased; “ well,” he said, “ let it be how it will he wished it done;” but it does unfortunately appear that this *disinterested* anxiety for the interest of deceased's relations does not long continue. On the next day, on which it was arranged that Mr. Baker should call upon Mrs. Temprell and drive her to Notting Hill, whilst they were on their way thither, Mr. Baker began to say how he thought the deceased ought to leave her money, and Mrs. Temprell goes on to depose, “ that he went through a plan of his
“ own, quite different from her's,” and concludes,
“ as to the rest I have put that down for myself, its
“ only about 1,000*l.* or some such sum.” He did not

put any paper into Mrs. Temprell's hands on this occasion, but said he had drawn out one to that effect, and had given it to Mrs. Brown at the house (which turns out to be the fact, although it has not been thought proper to examine Mrs. Brown, who might perhaps have been able to give a more accurate account of the contents of the paper, than Mrs. Temprell). Heath states, (to the seventh Interrogatory) that she did deliver a paper to Mrs. Brown and Mrs. Temprell on or about Tuesday, the 15th of April; "such paper had been given to her by "Mr. Baker with directions to deliver it to Mrs. "Brown. He did not tell her the contents, or "purport of it, nor did she know the same in any "way; but, she adds, "I do believe it was in- "tended as instructions for such a will as Mr. "Baker wished the deceased to make, I so believed "from what took place on the occasion, Mrs. "Brown said she would fetch Mr. Brown and then "she thought it would be done, and she said she "had rather Mrs. Temprell should go up and read "it to her, and Mrs. Temprell did go up, but pre- "sently came down and said it was of no use, and "said she would burn it, but I did not see her "do it."

She therefore confirms Mrs. Temprell's account as far, at least, as to her visit to deceased upon the 15th of April; to the delivery of a paper by Baker's desire to Mrs. Brown; to the conversation between Mrs. Brown and Mrs. Temprell, and to the fact of Mrs. Temprell having gone up alone to the deceased, her return and saying it was of no use, and that she would burn the paper.

Now then finding Mrs. Temprell confirmed by this adverse witness in so many particulars, it may not

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Mr. Baker must mainly if not almost entirely depend ; as she is the only individual, to whom it is suggested, that the deceased made any communication as to her testamentary intentions preparatory to the instructions which are said to have been given to Baker, on the 16th or 17th of April, and which led to the asserted execution of the will propounded on the 19th.

It will be recollected, that instructions had been given by Baker to Gamlen to prepare a will for execution, on the 8th of April preceding, that a fair copy had been prepared ; and that on the afternoon of the 14th of April, Brown had gone down to Notting Hill with that will in his pocket ; with respect to which, however, Baker told him *she* had changed her mind, and to which no allusion was made by the deceased in her conversation with Mr. Brown, the only paper referred to being that which had been prepared by Gray ; and it will also be borne in mind, that on the same day, the interview between Baker and Mrs. Temprell had taken place, and that, in consequence of what had then passed, Mrs. Temprell had gone to the deceased on the next day, and had produced to her a paper purporting to contain a disposition of her property, drawn up by Baker, and delivered to her by Mrs. Brown, who had received it from Mr. Baker for the purpose of endeavouring to prevail upon deceased to sign it, but that she refused.

Now the account which Heath gives is this ; it is on her examination on the second Article of the Condidit, she had said, on the first Article, that “ the deceased told her that she had had her money “ settled upon herself, and she could make a will ; “ but she told me if she did not make a will, all her

property would go to her nephew, James Batt, she did now say how, whether by her marriage settlement, or her husband's will, only that he would come into it all if she did not make a will. She then goes on to depose that, "she did, however, make a will, and I saw her sign it, and I witnessed it, I did so in manner as I will depose." She then proceeds to relate the manner in which the conversation began and the purport of it; this took place on the Monday, a week before her death, this was on this same 14th of April. "On the Monday in the week before she died, I was nursing her when as we were alone together in her room, the front room on the first floor where she was confined to her bed, she said to me, Mrs. Heath, 'I don't think I shall get better of this illness, and I think the sooner I make my will the better,' or words to that effect. I replied I think so too, Mrs. Baker, or to that effect. She then went on to tell me what she meant to do with her property. She said she should like to leave Mrs. Beasley's children a hundred pounds a piece, they were her late husband's, Mr. Phillips's, sisters' children, there are six of them, and she added, she should like to leave Mr. Phillips's father one hundred too, and Miss Brown two hundred, that is a daughter of her late husband's brother, her name is Phillips too, but they call her Brown, because her mother had married again a man of that name. I recollect she said as the reason why she gave her more than her husband's father, that Mr. Phillips was old and would not want it long, and one hundred would be enough for him. She also said she should

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 “ continued, they will all expect something at my
 “ death, and they’ll be better pleased to have a
 “ something now, for they all want it, and they
 “ can go into business with it, and I think I have
 “ done what’s right, don’t you think so, Mrs.
 “ Heath? I said, indeed, I did think so. This is
 “ as near as I can recollect what she told me of her
 “ intentions on the Monday, but she did not at
 “ that time tell me any more, nor whether she
 “ should leave her husband anything, or should
 “ give directions to any body to make a will for
 “ her.”

Now that she should have chosen this particular
 time to make this communication to Heath, being
 the first occasion on which she had mentioned the
 subject to her, although she had been in constant
 attendance upon her for twelve weeks preceding,
 does appear most extraordinary, particularly when
 it is further considered that this must have imme-
 diately followed on her refusal to execute the paper
 prepared by Gamlen, by which the husband was
 to have the whole property for life; and the ac-
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 what passed between the deceased and Brown on
 the afternoon of the same day, and to the commu-
 nication between Mrs. Temprell and Baker. But
 if the account of what passed on this day, Monday
 the 14th, is improbable on the face of it, that which
 occurs on the 16th is still more so, for in the in-

terval, Mrs. Temprell had visited the deceased, had read to her the paper left with Mrs. Brown by Baker's desire, which she had refused to execute, and had declared that Baker should have no part of her property. The account is this :—

“ I recollect, however, on the Wednesday she
 “ was worse, and said to me, ‘ I wish my business
 “ ‘ was settled,’ I asked her what business, and she
 “ said her will, and she should like to have it
 “ settled, and said she felt so much fluttering at her
 “ heart. I said if she pleased I would go down
 “ and tell Mr. Baker, and she said do ! but when I
 “ went he was gone to town.”

And the person she sends for, is *Mr. Baker* himself, who, however, had left the house before he received the message ; but on his return on the evening of the same day, he is as Heath states alone with her for two hours, at the end of which time Heath goes into the room and says to her, “ Mrs. Baker you look better,” to which she replied, “ I feel more happy, I’ve given Mr. Baker “ directions, and its all done but signing”—all done but signing ! why, it had all been done but signing for two months, for according to Baker’s account, she had had it in her possession from the 20th of February, snugly deposited in her drawer, from whence it must have been taken out for the purpose of being used on this occasion ; for that is the will which is subsequently executed, and it is not pretended that any other was drawn up ; and strange to say, not a syllable is mentioned to Heath of such a paper being in existence ; for she goes on to say, “ that on the next morning, the 17th, on “ opening the drawers in deceased’s bed-room, in

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“ the middle drawer, she saw a paper, which she “ had not before seen and noticed it to her ;” deceased said “ I suppose its my will, give it me,” which she did ; “ deceased took it and looked at it “ off and on for nearly an hour ;” and adds, “ she “ could not read writing much, she could a little,” and mentions a circumstance respecting a letter from the deceased’s late husband’s brother, which after looking at it, she said was a begging letter ; and so this poor woman who could with the utmost difficulty contrive to read enough of a letter to discover that it was a begging one, is to be taken to have been looking on and off this will for an hour, and thereby to collect a knowledge of its contents ; she having, during two month’s preceding, had an opportunity of referring to it whenever she pleased, and it having been drawn up by her express directions, for such is the case set up by Baker. The whole story is grossly improbable ; she goes on to describe the paper which deceased gave her to replace in the drawers, saying, “ it only wants signing, but “ there must be two people to witness it ;” so that, at this time, she was perfectly aware that it would be utterly useless to sign it, unless in the presence of two witnesses ; but she goes on to ask whether Heath will be one ; she replies, she cannot write ; deceased says, “ that’s of no consequence, you “ can make your mark,” and then adds, “ I should “ like Mrs. Foweraker to be the other witness,” that is Mr. Baker’s sister, but she did not desire she should be sent for ; and the witness then says that Mrs. Foweraker was in the habit of coming to see her, but she had not come before for a fortnight ; but Mrs. Baker said, “ perhaps she will

come before the week is over;" and it did so happen that she came the next day, "but only to pay her a visit." Now then the intention of the witness is, to represent, that contrary to her usual habits, Mrs. Foweraker had not been to see the deceased for a fortnight, that, that was an unusual length of time for her to absent herself; and, therefore, that there was nothing extraordinary in the deceased's apprehension of a visit from her in the course of the week, or in the fulfilment of her augury, by the appearance of Mrs. Foweraker so opportunely.

Now what says Mrs Foweraker, on the first Article of the Condidit, "she has visited them since their marriage, and staid a few days with them at Gravesend, she has also staid with them at their house, Boyne Terrace, Notting Hill;" but at what time, or on what occasion she does not inform us, whether within the last six months or any other time; but she adds she went to see her on the 18th of April, that is Friday. "I had heard," she says, "she was ill;" why she had been ill and confined to her house from December, 1833; "but at that time I was ill myself, I had been confined to my bed six weeks; but, being then better, went to see her, not intending to stay, but deceased requested me to do so, and I remained there all night." At all events, then Mrs. Foweraker had not been to visit deceased for six weeks before the 18th of April; "she had heard of her illness," which had certainly much increased from the month of February, when Mr. Hora was called in for the second time, and it is plain that she had not visited the deceased since

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her illness, and it is not, therefore, by any means improbable that she had not seen her for two months, or perhaps a longer time.

Now it is said, that this is no such contradiction between the witnesses as to infer perjury on the part of Heath, and perhaps that observation may be well founded; but it certainly is a most extraordinary circumstance, that the deceased should have selected a person to be a witness to her will, whom she had not seen for six weeks, perhaps two months, on the bare speculation (for no person is sent to her) that she might possibly come before the expiration of the week. But was she, in other respects, a likely person to be selected as a witness?

In answer to the fifth Interrogatory, Heath says, that “when she was first taken ill, she had a great dislike to Mrs. Foweraker, Mrs. Temprell had said some ill-natured things against her which Mrs. Baker at first believed, but after a time did not notice them”—“but latterly Mrs. Foweraker has staid on more than one occasion at the house, and the deceased has asked her so to do, and not requested that she might be sent away;” and on her second examination, in answer to the seventh Interrogatory, she says, “I know that deceased had a great dislike to Mrs. Foweraker, she requested that she might not nurse her, but not that she might be kept altogether away from her, her fall-out with Mrs. Foweraker, had been made up, and Mrs. Baker herself told me, that she had found out that it was more Mrs. Temprell’s doing than Mrs. Foweraker’s, but I never could make out what it was, I am sure, however, that during

“ the time I nursed her, the deceased was not
 “ averse to seeing her as a visitor, for she came
 “ several times, and deceased was glad to see her.”

The witness does not state at what time the quarrel took place, at what time a reconciliation was effected, or when the last visit was paid ; certain it is that it was not within six weeks, and this makes the account still more improbable and certainly gives rise to a conjecture, that the selection of Mrs. Foweraker was the act of Mr. Baker, rather than that of the deceased. This is what passes on the 17th of April, between Mrs. Heath and deceased. On the next day, Mrs. Foweraker visits the deceased, and upon her getting-up to take leave, deceased requests her to stop ; from Foweraker's account, nothing passes on the subject on that day between her and deceased ; but on the next morning, the 19th, the alleged execution takes place, and certainly nothing can be more strong than the evidence of this witness to the observance of all the requisites for the due execution of a will, (and which she repeats in answer to the second Interrogatory) but the question is, whether she has deposed in such a manner as to be entitled to implicit credit, under all the circumstances. Upon her second examination, on the first Article, after having spoken of the attention paid by Mr. Baker to the deceased, she says, on the subject of her intentions to benefit her husband or his children by her will, she never heard her say much, indeed she says, “ I never heard her
 “ speak at all on the subject till the last week of
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been alluded to, passed between them. If she was sincere in what she said to Mr. Brown about the will in Gray's hands, she seems to have had no intention of executing it in the form in which it then was, though she might adhere to the substance of it; but if not, then she might wish to avoid importunity upon the subject, but certainly it will not warrant an inference that she was contemplating the execution of the paper of the 20th of February; and yet, according to Heath, she had on the morning of this very day, held a long conversation with her as to the manner in which she meant to dispose of her property, in the course of which she is represented to have declared her intentions almost in direct conformity with that instrument; certainly when Mr. Baker left her on that morning, he had no idea that she had any such intentions; he intimates nothing of the kind to Brown when he meets him, beyond saying that she had altered her mind and meant to give what she intended for her poor relations, to them at her death and not at his; whether any such intention was expressed to him by the deceased, there may be considerable doubt, his conduct does not seem consistent with such a supposition, for on going to London he calls upon Gray and Temprell and has a conversation with them, the particulars of which for reasons before assigned it is not necessary to state, further than that it is evident that at this time he had no expectation or idea that the deceased had it in contemplation to execute any testamentary act.

After having seen them, he has also an interview with Mrs. Temprell, what passed between them is stated by Mrs. Temprell on the thirteenth Article, of the allegation, and this appears to have been the

first time of their meeting since December, 1833, when the report before referred to had been set about by Baker; Mrs. Temprell says in allusion to this circumstance, that “Baker seemed at first “very confused and awkward, and said he would “give a hundred pounds to any one who would “make out that he had said so;” and after some short conversation on that subject, she goes on to state what he said to her, and which it is right to give in the words of the witness (on the thirteenth Article). “He pressed me very much to go and “speak to his wife, he said he understood there “was a will but it was not signed, I told him it “was as he supposed, but I had promised her not “to trouble her again on that subject. ‘Oh,’ he “said, ‘he did not want me to ask her, her wanted “‘to ask me, her wished to sign her will;’ I said “that altered the case, and he then from him- “self pressed me to go, and said if I would, he “would come up and fetch me in his chaise next “day, he said, ‘her was very bad, her was a dying “‘and could not live many days.’ I told him it “was not of much matter to him whether she “signed the will or not, for she had left the great- “est part of her property to her own relations, I “said as much as 1,760*l.*, and that there was 50*l.* “a piece to the Beasleys, and 100*l.* to Miss Brown, “and she had left me 100*l.*; but I said there was “a something for his family, I did not tell him “how much, I said if she don’t sign it her rela- “tions will get it, and if she does it won’t make “much difference to you; ‘well,’ he said, ‘let it “‘be how it would he wished it done;’ and as he “buttoned his coat to go, he said, ‘If her don’t “‘leave me some of her money, I don’t think I’ll

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“ ‘ order her funeral, still,’ he said, ‘ no matter he
 “ ‘ wished it signed,’ and if I would come and talk
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 “ at last I promised.”

Now this communication with Mrs. Temprell is of great importance. It shows not only that Mr. Baker himself was extremely anxious to have a will executed by the deceased, and that he despaired of being able to effect it by his own influence with her; but it proves also, that in his opinion the deceased's confidence in Mrs. Temprell continued unabated, and it also proves that at this time he was acquainted with the contents of the will prepared for the deceased by Gray, and that it was unsigned at this time. Now it is admitted that this interview did take place, and it has been argued upon as showing the disinterested character of Baker's anxiety for the execution of the will, inasmuch as although he was aware that the contents of the will which Mrs. Temprell had referred to were unfavourable to him, he still continues desirous that she should go to deceased; “ well,” he said, “ let it be how it will he wished it done;” but it does unfortunately appear that this *disinterested* anxiety for the interest of deceased's relations does not long continue. On the next day, on which it was arranged that Mr. Baker should call upon Mrs. Temprell and drive her to Notting Hill, whilst they were on their way thither, Mr. Baker began to say how he thought the deceased ought to leave her money, and Mrs. Temprell goes on to depose, “ that he went through a plan of his
 “ own, quite different from her's,” and concludes,
 “ as to the rest I have put that down for myself, its
 “ only about 1,000*l.* or some such sum.” He did not

put any paper into Mrs. Temprell's hands on this occasion, but said he had drawn out one to that effect, and had given it to Mrs. Brown at the house (which turns out to be the fact, although it has not been thought proper to examine Mrs. Brown, who might perhaps have been able to give a more accurate account of the contents of the paper, than Mrs. Temprell). Heath states, (to the seventh Interrogatory) that she did deliver a paper to Mrs. Brown and Mrs. Temprell on or about Tuesday, the 15th of April; "such paper had been given to her by "Mr. Baker with directions to deliver it to Mrs. "Brown. He did not tell her the contents, or "purport of it, nor did she know the same in any "way; but, she adds, "I do believe it was in- "tended as instructions for such a will as Mr. "Baker wished the deceased to make, I so believed "from what took place on the occasion, Mrs. "Brown said she would fetch Mr. Brown and then "she thought it would be done, and she said she "had rather Mrs. Temprell should go up and read "it to her, and Mrs. Temprell did go up, but pre- "sently came down and said it was of no use, and "said she would burn it, but I did not see her "do it."

She therefore confirms Mrs. Temprell's account as far, at least, as to her visit to deceased upon the 15th of April; to the delivery of a paper by Baker's desire to Mrs. Brown; to the conversation between Mrs. Brown and Mrs. Temprell, and to the fact of Mrs. Temprell having gone up alone to the deceased, her return and saying it was of no use, and that she would burn the paper.

Now then finding Mrs. Temprell confirmed by this adverse witness in so many particulars, it may not

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 “ Heath? I said, indeed, I did think so. This is
 “ as near as I can recollect what she told me of her
 “ intentions on the Monday, but she did not at
 “ that time tell me any more, nor whether she
 “ should leave her husband anything, or should
 “ give directions to any body to make a will for
 “ her.”

Now that she should have chosen this particular
 time to make this communication to Heath, being
 the first occasion on which she had mentioned the
 subject to her, although she had been in constant
 attendance upon her for twelve weeks preceding,
 does appear most extraordinary, particularly when
 it is further considered that this must have imme-
 diately followed on her refusal to execute the paper
 prepared by Gamlen, by which the husband was
 to have the whole property for life; and the ac-
 count is still more improbable with reference to
 what passed between the deceased and Brown on
 the afternoon of the same day, and to the commu-
 nication between Mrs. Temprell and Baker. But
 if the account of what passed on this day, Monday
 the 14th, is improbable on the face of it, that which
 occurs on the 16th is still more so, for in the in-

terval, Mrs. Temprell had visited the deceased, had read to her the paper left with Mrs. Brown by Baker's desire, which she had refused to execute, and had declared that Baker should have no part of her property. The account is this :—

“ I recollect, however, on the Wednesday she
 “ was worse, and said to me, ‘ I wish my business
 “ ‘ was settled,’ I asked her what business, and she
 “ said her will, and she should like to have it
 “ settled, and said she felt so much fluttering at her
 “ heart. I said if she pleased I would go down
 “ and tell Mr. Baker, and she said do ! but when I
 “ went he was gone to town.”

And the person she sends for, is *Mr. Baker* himself, who, however, had left the house before he received the message ; but on his return on the evening of the same day, he is as Heath states alone with her for two hours, at the end of which time Heath goes into the room and says to her, “ Mrs. Baker you look better,” to which she replied, “ I feel more happy, I’ve given Mr. Baker
 “ directions, and its all done but signing”—all done but signing ! why, it had all been done but signing for two months, for according to Baker’s account, she had had it in her possession from the 20th of February, snugly deposited in her drawer, from whence it must have been taken out for the purpose of being used on this occasion ; for that is the will which is subsequently executed, and it is not pretended that any other was drawn up ; and strange to say, not a syllable is mentioned to Heath of such a paper being in existence ; for she goes on to say, “ that on the next morning, the 17th, on
 “ opening the drawers in deceased’s bed-room, in

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“ the middle drawer, she saw a paper, which she
“ had not before seen and noticed it to her ;” deceased said “ I suppose its my will, give it me,” which she did ; “ deceased took it and looked at it
“ off and on for nearly an hour ;” and adds, “ she
“ could not read writing much, she could a little,” and mentions a circumstance respecting a letter from the deceased’s late husband’s brother, which after looking at it, she said was a begging letter ; and so this poor woman who could with the utmost difficulty contrive to read enough of a letter to discover that it was a begging one, is to be taken to have been looking on and off this will for an hour, and thereby to collect a knowledge of its contents ; she having, during two month’s preceding, had an opportunity of referring to it whenever she pleased, and it having been drawn up by her express directions, for such is the case set up by Baker. The whole story is grossly improbable ; she goes on to describe the paper which deceased gave her to replace in the drawers, saying, “ it only wants signing, but
“ there must be two people to witness it ;” so that, at this time, she was perfectly aware that it would be utterly useless to sign it, unless in the presence of two witnesses ; but she goes on to ask whether Heath will be one ; she replies, she cannot write ; deceased says, “ that’s of no consequence, you
“ can make your mark,” and then adds, “ I should
“ like Mrs. Foweraker to be the other witness,” that is Mr. Baker’s sister, but she did not desire she should be sent for ; and the witness then says that Mrs. Foweraker was in the habit of coming to see her, but she had not come before for a fortnight ; but Mrs. Baker said, “ perhaps she will

come before the week is over ;” and it did so happen that she came the next day, “ but only to pay “ her a visit.” Now then the intention of the witness is, to represent, that contrary to her usual habits, Mrs. Foweraker had not been to see the deceased for a fortnight, that, that was an unusual length of time for her to absent herself ; and, therefore, that there was nothing extraordinary in the deceased’s apprehension of a visit from her in the course of the week, or in the fulfilment of her augury, by the appearance of Mrs. Foweraker so opportunely.

Now what says Mrs Foweraker, on the first Article of the Condidit, “ she has visited them “ since their marriage, and staid a few days “ with them at Gravesend, she has also staid with “ them at their house, Boyne Terrace, Notting “ Hill ;” but at what time, or on what occasion she does not inform us, whether within the last six months or any other time ; but she adds she went to see her on the 18th of April, that is Friday. “ I had “ heard,” she says, “ she was ill ;” why she had been ill and confined to her house from December, 1833 ; “ but at that time I was ill myself, I had “ been confined to my bed six weeks ; but, being “ then better, went to see her, not intending to “ stay, but deceased requested me to do so, and I “ remained there all night.” At all events, then Mrs. Foweraker had not been to visit deceased for six weeks before the 18th of April ; “ she had heard of her illness,” which had certainly much increased from the month of February, when Mr. Hora was called in for the second time, and it is plain that she had not visited the deceased since

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her illness, and it is not, therefore, by any means improbable that she had not seen her for two months, or perhaps a longer time.

Now it is said, that this is no such contradiction between the witnesses as to infer perjury on the part of Heath, and perhaps that observation may be well founded; but it certainly is a most extraordinary circumstance, that the deceased should have selected a person to be a witness to her will, whom she had not seen for six weeks, perhaps two months, on the bare speculation (for no person is sent to her) that she might possibly come before the expiration of the week. But was she, in other respects, a likely person to be selected as a witness?

In answer to the fifth Interrogatory, Heath says, that “when she was first taken ill, she had a great dislike to Mrs. Foweraker, Mrs. Temprell had said some ill-natured things against her which Mrs. Baker at first believed, but after a time did not notice them”—“but latterly Mrs. Foweraker has staid on more than one occasion at the house, and the deceased has asked her so to do, and not requested that she might be sent away;” and on her second examination, in answer to the seventh Interrogatory, she says, “I know that deceased had a great dislike to Mrs. Foweraker, she requested that she might not nurse her, but not that she might be kept altogether away from her, her fall-out with Mrs. Foweraker, had been made up, and Mrs. Baker herself told me, that she had found out that it was more Mrs. Temprell’s doing than Mrs. Foweraker’s, but I never could make out what it was, I am sure, however, that during

“ the time I nursed her, the deceased was not
 “ averse to seeing her as a visitor, for she came
 “ several times, and deceased was glad to see her.”

The witness does not state at what time the quarrel took place, at what time a reconciliation was effected, or when the last visit was paid ; certain it is that it was not within six weeks, and this makes the account still more improbable and certainly gives rise to a conjecture, that the selection of Mrs. Foweraker was the act of Mr. Baker, rather than that of the deceased. This is what passes on the 17th of April, between Mrs. Heath and deceased. On the next day, Mrs. Foweraker visits the deceased, and upon her getting-up to take leave, deceased requests her to stop ; from Foweraker's account, nothing passes on the subject on that day between her and deceased ; but on the next morning, the 19th, the alleged execution takes place, and certainly nothing can be more strong than the evidence of this witness to the observance of all the requisites for the due execution of a will, (and which she repeats in answer to the second Interrogatory) but the question is, whether she has deposed in such a manner as to be entitled to implicit credit, under all the circumstances. Upon her second examination, on the first Article, after having spoken of the attention paid by Mr. Baker to the deceased, she says, on the subject of her intentions to benefit her husband or his children by her will, she never heard her say much, indeed she says, “ I never heard her
 “ speak at all on the subject till the last week of
 “ her life, and then on occasion of her feeling so
 “ ill, and saying she did not think she should live

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“ and she wished the business was settled, and
 “ that she wished me to be a witness to it, she did
 “ speak of it, she said she should leave her rela-
 “ tions legacies, and that Mr. Baker was to have
 “ the rest, but she said there would not be much
 “ for him after all the legacies were paid.” On
 her former examination, she had said that deceased
 did not say whether she would leave her husband
 any thing—this seems, therefore, an after thought—
 and the remark as to the small amount of the bene-
 fit to him is not very probable to have been made
 by her, considering that it will amount to nearly
 1,000*l.*, and that she had refused to execute the
 will suggested by him, by which he was to have a
 legacy to that amount.

Upon the sixth Article, on her second examina-
 tion, this witness has mentioned incidentally a cir-
 cumstance on which much stress has been laid,
 but which would more naturally have found its
 place in her examination on the *Condidit*, and it is
 this; that in speaking of the capacity of deceased,
 at, and during the whole of her illness, and up to the
 moment of her death, and particularly on the 19th
 of April, the day the will was executed; she says
 on the day before, that is, on Friday the 18th,
 “ she told me to take Mr. Hora into the next room
 “ to show the will to him, in order that Sarah
 “ might not know of it, she did not say why he
 “ was to see it, nor did I hear any thing of their
 “ discourse; I merely mention it to show how well
 “ she was in her mind, and how able she was to
 “ make her will, &c.”

Now on this circumstance so incidentally men-
 tioned, a great deal of argument has been founded.

It has been asked if any purpose of fraud was to be answered, why should this paper have been shown to Mr. Hora, as one word mentioned by him to deceased, would have immediately discovered the fraud and defeated the purpose of the parties; and this is certainly true; but a good deal will depend upon the manner in which this communication was made to Mr. Hora. If Heath told him that it was by the desire of the deceased that she showed him the paper, the probability would certainly be, that he would mention the subject to her, and the consequences suggested might have followed; but if it was shown to him by Heath as of her own accord, without mentioning that it was by desire of deceased, then Mr. Hora, who had, as he says, applied to and urged the deceased to settle her affairs, but who had been silenced by her, and desired never to mention the subject again, there was, perhaps, not much danger to be apprehended; but it certainly is somewhat extraordinary that if, as Heath says, this communication was made to Mr. Hora by desire of deceased, that she should not have made any allusion to it, and that she should not have asked him to be a witness to it, particularly if, as Heath says, this took place on Friday the 18th, probably before the arrival of Mrs. Foweraker, of whose intention to visit her on that day the deceased could not have been aware. But let us see what account Mr. Hora gives of this circumstance; speaking of his attendance upon her and of the state of her case, he says, he has no memorandum of having attended upon her, but he has no doubt that he did, and he mentions having met Baker going to London, as he was going to visit

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the deceased ; Baker said the deceased was better, “ she has made her will,” and this he believes was on the 19th of April, and certainly agrees with the case set up that the will was not executed till that morning ; and at the conclusion of his deposition, he mentions the circumstance of Heath having put this paper into his hands saying, Mrs. Baker has made her will ; and on his observing that it was not signed, Heath pointed out to him a little cross upon it, but he took very little notice of it. Now then it is quite clear, that whenever this paper was shown to Hora, it had not been executed as it at present appears ; if this was on the Friday morning, of course the signature of the witnesses would not have appeared ; but if on the Saturday morning, as is clearly the strong impression on the mind of Mr. Hora, and from the expression made use of by Baker, “ that she had made her will,” it is more probable to have taken place on that day ; there does seem some room for doubting, at least, whether the execution of this instrument did take place in the presence of witnesses, and for suspecting that the mark was put in their absence, whether by deceased or not, and then that they signed their names afterwards.

For what purpose could the deceased have made the mark to it on the Thursday night ? As Mrs. Foweraker says, her brother told her she had, for she knew that the presence of two witnesses was necessary ; and when the Court sees that this small cross, which it is on all hands admitted to have been on the paper, is so completely covered by the mark now appearing upon it, as to render it imperceptible ; it does seem to countenance a suspi-

cion that the Court has not the real state and course of the transaction laid before it, and that the mark purporting to be that of the deceased was made by some person having more complete command over her hand, than in her weak state she could possibly have had.

I do not think it necessary to advert more particularly to the evidence of Mrs. Foweraker, to the general circumstances of the execution; she deposes much to the same effect as Heath, though not so much in detail, for if Heath's account does not satisfy me of the genuineness of the transaction, there is nothing in Mrs. Foweraker's which can supply the deficiency; and I confess that looking to all the circumstances of the case, I am of opinion, that it is one of a most suspicious character; that the disposition contained in the paper propounded, is not proved to my satisfaction to be such as it was probable that the deceased would have made, or wished to be carried into execution. I think the conduct of Baker, the husband—the party conveying the instructions for the preparation of this instrument, from whence he is to derive a considerable benefit, which it is my conscientious opinion, it was not the intention of the deceased to confer upon him—his misrepresentation to Mr. Gamlen of the cause of deceased's inability to write; his declining the attendance of Mr. Gamlen when offered; the applications which he made to different persons to get a will executed by the deceased, and the nature of the disposition to his own advantage: his conduct altogether savours too much of fraudulent contrivance to entitle him to any favourable consideration; and I am further of

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opinion that the account given by Heath, is marked in many parts with such circumstances of improbability, as to prevent the Court from giving her that degree of credit which would enable it to decide in favour of the validity of this paper; I therefore pronounce against it, and condemn Mr. Baker in costs.

Approved with Costs L. Moore P.C.C 319.

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE
ECCLESIASTICAL COURTS

AT

Doctors' Commons.

CONSISTORY COURT OF LONDON.

RAY *against* SHERWOOD AND RAY.

On admission of the Libel.

THIS was a question as to the admissibility of a libel in a cause of nullity of marriage by reason of affinity. The facts and circumstances of the case are sufficiently set forth in the Judgment of the Court.

Addams and *Nicholl* in opposition to the libel.

The *King's Advocate*, *Phillimore*, and *Haggard*, in support of the libel.

Burnaby for Miss Ray.

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HILARY TERM.
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1ST SESSION.

The service of a citation sufficient to constitute pendency of suit.

Held, That the father, *quod* father, has not sufficient interest to institute a suit in the civil form for the purpose of annulling the marriage of his daughter, when of age.

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JUDGMENT.

DR. LUSHINGTON.

The facts which gave rise to the present suit are as follow :—In the month of June, 1835, Emma Sarah Ray was married to Thomas Moulden Sherwood. He had been previously married to her sister, who had died some time before the second marriage. On the 24th August in the same year, a citation was taken out against both these parties, at the instance of Robert Ray, alleging himself to be the father of Emma Sarah Ray, and as such interested in the legitimacy of her issue. The proceeding was in what is called the civil form, and the citation was personally served on both parties on the 24th August, the day of its date. The citation calls on the parties to appear on the third day after service, if that be a court-day, if not, on the court-day next ensuing. The 9th of September was the first court-day, and then the citation was returned into Court. Proxies for Mr. Ray and his daughter were brought in on that day. On the 9th of October, a proxy for Mr. Sherwood was exhibited. On the 9th of September the libel was brought in, and on the 17th November additional articles.

The contents of the libel are as follow : it pleads in the common form ; first, the marriage of Mr. Ray, the father, and the birth of two daughters, Anna Rachel Louisa, and Emma Sarah ; the marriage of Anna Rachel Louisa to Mr. Sherwood, in the year 1827 ; her death in April, 1834 ; and this marriage in June, 1835. These are facts necessary to be pleaded in every suit of this description.

It further specially pleads, that the marriage

was clandestine, that the parties were not resident in the parish where the marriage took place, and that it was not discovered till the 22d August, 1835, these proceedings having commenced on the 24th August. And it may be expedient, in order to clear the way, for me to express my opinion as to these special and peculiar circumstances, and to say that I conceive they cannot have the least bearing on the Judgment which I have to pronounce; because, in the first place, I know not how it is possible that the clandestinity of the marriage could affect its legality, with reference to the relations of the parties; and, in the second place, because it has been finally settled, that the non-residence of the parties in the parish cannot be pleaded in any suit for annulling the marriage itself; and, thirdly, because I do not think the expedition with which the party has attempted to avail himself of his right can affect the ultimate decision of the cause.

The additional Articles plead, first, a letter of Mr. Sherwood, to prove concealment, which is pleaded in the 10th article of the libel; and secondly, that Emma Sarah Ray is entitled, under the will of her great uncle, to some property.

The admissibility of the libel and articles has been very fully, laboriously, and learnedly argued, and I cannot but feel indebted to the counsel on both sides for furnishing me with so much information in this case.

Two objections have been urged to the admissibility of the plea, in other words, to the maintenance of the suit itself. The first is, that however competent this proceeding might formerly have been

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the Statute 5th and 6th Will. IV. c. 54, ^{22 Aug 1835} passed in the last session of Parliament, has rendered all such marriages valid, save those which fall under a distinct exception in the Act itself: Secondly, that the father has no legal interest sufficient to give him a *persona standi*, or which can entitle him to carry on a civil suit.

On looking to the Statute in question, no one can entertain a doubt that the validity of this marriage is unimpeachable, unless, according to the terms of the Statute, there was "a suit depending at the time of the passing of the Act," *videlicet*, on the 31st August.¹⁸³⁵ Marriages liable to be objected to on the ground of affinity are, by the operation of this Act generally made completely valid to all intents and purposes, with the exception I have before mentioned, and the *onus* of bringing the case, within the exception, falls on the promoter of the suit, and in this case it is contended, on his behalf, that he has discharged that *onus*, by proving the service of the citation on both parties, on the 24th August, that is, seven days before the Act came into operation. The counsel for Mr. Sherwood have contended, that this was insufficient; that there is no *lis pendens* without a *litis contestatio*, which clearly had not taken place in this cause on the 31st August. The question I have to determine, with reference to this point, is, what the Legislature meant and intended by the expressions in the Act of "a suit depending at the time of the passing of the Act." The object of the Legislature, so far as I can collect it from the words of the Statute, was, in the first place, to prevent such marriages in future, by rendering them null and void; and,

secondly, to prevent the uncertainty which existed under the old law, as to the *status* and condition of children, and the rights they might have.

The proceeding contemplated related to the Ecclesiastical Courts only ; and the first consideration as it strikes my mind, which I have to determine, is, whether the expressions used in the Statute are technical expressions, well known and admitted, and recognised in the Spiritual Courts ; if so, I apprehend the Legislature must be presumed to have used them in that sense : in the same manner as if, with reference to other tribunals, the Legislature had used the expressions “ heir-at-law,” or “ tenant in tail,” which are technical terms, and which must be supposed to be used in a technical sense. It has been said, in this case, that it is the known acceptation of *lis pendens* to mean the proceedings after the *litis contestatio*. How is such an averment to be proved? In the first place, if I could have found any decisions of these Courts, which were applicable to this point, I should have considered them the very best proof of this averment. None have been cited, and, to my knowledge, and as far as my search and investigation have gone, none exist in which the question has been discussed and decided.

The next mode, though perhaps, a less satisfactory method, is to look to books of practice ; and looking to books of practice, I do not find that the position has been laid down as generally recognised or admitted : it is rather an inference from the divisions into which the subject has been parted, than a doctrine sanctioned by daily experience. There appears a doubt as to the ac-

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curacy and certainty of the divisions themselves, and as to what is said to form the *judicium*. Oughton, I find, in his Synopsis, says: "Judicium ex tribus constat, videlicet; principio, quod est litis contestatio; intermediis, quæ sunt probationes; fine, qui est sententia."—"Litis contestationem præcedunt nonnulla (quæ præparatoria judicii appellantur); utputa, citatio, certificatorium, procuratoris constitutio, libelli oblatio." So that, according to his definition, even the appearance of the Proctor in the Cause, and the offering of the libel, are merely preparatory proceedings, and prior to the *litis contestatio*. In Conset (pt. 2, c. 1, s. 1, par. 3,) it is said: "That which (according to Wesembecy) is called preparatory to judgment, (but is no essential part of it), is the citation, and the mediate parts (*scil.*), the proof made in the cause. But Mynsinger proves the contrary (*scil.*) that the *jus vocatio*, this calling to justice, or the citation, is to be accounted for the very foundation of the judicial order, being, as it were, the *causa sine quâ non*." To be sure, it is a rather startling proposition, that by possibility the proofs could be taken in a cause, and yet there be no *lis pendens*.

I confess, in this state of things, I find extreme difficulty in saying that the *lis pendens* is entirely governed by their being a *litis contestatio*. In the first place, a *litis contestatio* exists only in plenary suits, and it is not easy to say what is equivalent to the *litis contestatio* in summary and other proceedings. This point was very much considered in the case of Byerly and Windus, (a) which

(a) 5 Barn. and Cressw.

went to the Court of King's Bench. Mr. Justice Bayley says there, if the report is correct, "According to the usage and course of proceeding in the Courts Christian, neither the personal answer nor the plea, ever put in issue any of the facts in a libel; they are put in issue or admitted by a previous step,—a negative or affirmative issue; a negative issue denying what the libel states, an affirmative issue admitting it." This is true respecting the plenary form, but it is exceedingly difficult to say what the *litis contestatio*, or joining issue, is equivalent to, in the summary form of proceeding. Again, if the *litis contestatio* be necessary to constitute a *lis pendens*, the contumacy of a party may completely defeat it. For an instance of this kind occurred about a twelvemonth ago, where the party absconded; and in such cases, the party legally interested, may have used all due diligence in promoting the Suit, and yet, by the contumacy of the party proceeded against, justice may be defeated.

In order to throw a light upon this doubtful point, a variety of authorities have been cited from the Civil Law. Now I must observe, that, to constitute these authorities law in England, they must have been received and acted upon here; and especially is it necessary to adhere to this principle; when it is sought by them to bind the legislature to the use of a technical expression. These are authorities, not as to a great principle of law, but to the practice of foreign Courts; and, therefore, *à fortiori*, they must be received and acted upon here, in order to be entitled to any weight at all. In the third place, without going through all these authorities

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minutely, which would occupy a considerable and unnecessary space of time, I think I may truly say, that they are not all clear and consistent upon the subject, but that there are material differences between these writers.

I find that, in Scotland, where the whole system of ancient jurisprudence is mainly built on the Civil Law, and where reference is hourly made to books of authority on the law and practice of that system, a question similar to the present was raised in the year 1787, in the case of Morrison and Alardes (*a*). In that case, which was a matrimonial suit, a question arose as to the term *lis pendens*, and what constituted a *lis pendens*; and this distinction occurs, that originally, by the law of ancient Rome, the service of the citation did not constitute a *lis pendens*, by reason that the citation, or summons itself, was so vague and uncertain, being without specification, that no person could say what was the matter in dispute. But this fact was stated in the argument; that, after the time of Justinian, and when the citation served in the cause contained a more accurate specification of the facts and the proceedings, the question assumed a different aspect, and was differently decided. Singularly enough, that point in the argument, whether or not the issue of the citation constituted a *lis pendens*, excited the greatest difference of opinion amongst the learned judges who then presided in the Scotch Courts. There were no less than three on one side, and two on the other; and the two dissentients were as learned persons, men of as high character for legal know-

(*a*) Morrison's Dict. of Dec. 8335.

ledge, as ever adorned the Scottish bench. On one side were the Lord President Dundas, the Lord Justice Clerk Miller, and Lord Eskgrove, who held that the service of the citation did not constitute a *lis pendens*; on the other side, Lord Monboddo and Lord Braxfield held the contrary. Lord Braxfield is admitted to have been one of the most eminent of the learned judges of that country. In tracing this question further, I find that it was considered at the time, that the subject was left in doubt and uncertainty; and Mr. Bell, the learned commentator on the law of Scotland, says, that it is still considered unsettled.

These considerations bring me to this point: I am not satisfied in my own mind that there is any distinct technical meaning notoriously attached to the expression *lis pendens*. I am not satisfied in my judgment that the meaning sought to be attached to it by the counsel for Mr. Sherwood has been clearly and distinctly recognised by Ecclesiastical Law and Practice. I am not satisfied that the Civil Law is clear or uniform on this point, or received here.

Then how stands the question, with reference to analogous proceedings in other Courts of this country? It is not necessary to penetrate deeply into the mode in which the subject has been considered in Courts of Common Law, because I have had the good fortune to find a decision in a Court of Equity, which appears to have a strong bearing on the subject; a decision which, from the period at which it took place, I consider more valuable than if it had been pronounced in any proceeding at the present time. The case which I advert to is that of "*Pigott against Nower*," which is reported in 3 Swanston's

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Reports (a). The case itself was decided by Lord Nottingham in the year 1677. I will state the reason why the decision in this case is entitled to great weight. In the first place, it is notorious that the proceedings in the Court of Chancery, were originally much more founded on the doctrines and practice of the Civil Law, than those of the Common Law Courts of the country were. In the second place, the decision was given at a time when the proceedings of that Court were more in conformity to its ancient forms of process, than they have subsequently been. Thirdly, it is the authority of Lord Nottingham, than whom a higher authority could not be produced.

Lord Nottingham, in deciding the question, laid down what he considered to be a *lis pendens*, "I conceived," he says, (it is a paragraph in a note, p. 535) "that a judgment after the *teste* of a "*subpæna*, and before the return of it, or before "*the bill filed, is a judgment pendente lite*; for "*when the subpæna is returned, it is depending "*from the teste of it, as all other originals are, "*and so much was implied in the resolution of "*'Burgh v. Francis.'* It was objected that it could "*not properly be said lis pendens till the bill filed, "*because, till then, the true cause of suit is not "*known, the subpæna being only quibusdam certis "*de causis*; but I regarded not the objection, be- "*cause every subpæna is as certain as a latitat, and "*yet the Common Law allows a latitat to bind "*from the teste, and the Chancery will favour a "*subpæna more than a latitat*; nay, perhaps, it will*********

(a) Pigott v. Nower, 3 Swanston, p 535.

“ control the Common Law in case of a *latitat*, as I
 “ have said before in ‘Parker and Dee.’” This
 appears to be the common sense of the rule,—that
 is, that the *lis pendens* should be considered to
 commence from the time of taking out the formal
 proceedings, from whatever Court they may origi-
 nate, and serving notice of those proceedings, or
 attempting to serve it on the defendant, provided
 the instrument initiating or commencing the process
 shall, with sufficient clearness and certainty, state
 the object of the suit: for this appears to be the
 principle which has governed from the time of Jus-
 tinian to the present day. Now the citation, in this
 case, does clearly shew the parties to the suit the
 jurisdiction, and the objects sought to be obtained
 by the suit. Then I am strongly inclined to come
 to the conclusion, that Parliament has used these
 words in a general sense, and I can discern no ade-
 quate reason for imposing a more restricted meaning.
 I conceive that the Legislature intended, that the
 relief proposed to be given should not be extended
 to cases, save where persons having an interest, had
 already asserted that interest by the commencement
 of legal proceedings. I cannot conceive any just or
 adequate cause for a different intention, and for de-
 priving them of their right to prosecute a suit,
 which, in this case, was as much commenced *bond
 fide* by the party, by the service of the citation, as if
 a *litis contestatio* had taken place. For these rea-
 sons, I have come to the conclusion, that it is my
 duty to overrule the first objection, and to state my
 conviction, that Mr. Ray is not barred from prose-
 cuting this suit on the ground that no suit was
 depending in the Ecclesiastical Courts at the time
 of the passing of the Act in question.

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I now come to the consideration of the second point which has been raised in this case, on which, I confess, I have felt infinitely greater difficulty; whether it is competent to Mr. Ray, the father, to bring a suit in a civil form. There are two forms of proceeding in such cases, criminal and civil; and it may be necessary to consider the object of both. In the criminal form of proceeding, the office of the Judge may be promoted by any one, with the permission of the Judge himself; the promoter need have no interest; for the object of the suit is to punish and prevent the commission of that which the law deems an offence; it does not seek to secure or advance the interest of any one, if such effect is produced by the sentence, it is purely incidental, and no part of the judicial object of the suit. With respect to a civil suit, it is admitted on all hands, that to enable any person to institute a suit in the civil form, the individual, seeking to commence the suit, must make out an interest of some kind or other. The difficulty appears to be to determine what that interest should be. But the fact, that the party proceeding should have an interest, clearly defines the nature of the suit, namely, that it is not *ad publicam vindictam*, but for the interest of the party concerned, who brings the suit.

To prevent all confusion, I may observe, before I proceed further, that all considerations as to suits in respect to minors, have no application to the present question. Here both parties are of age; the parent, as the natural guardian, has no power to bring such a suit, nor, if he were dead, would any testamentary guardian have any authority whatsoever so to proceed.

Again: I observe that a case might arise, in

which a father himself might not have such an interest as that set up. For instance: if Emma Sarah Ray had been previously married, and had children surviving, the father clearly would have no interest in case of intestacy, and, as father, it is clear that he could not bring this suit. Any offence to his feelings, any desire to prevent an intercourse he might deem culpable—all such objects would be properly and fitly attained by a criminal proceeding; but they are not at all within the view or compass of a civil suit, which protects only the civil interests of mankind. These considerations appear to me to advance the case another step, and to shew that it is, as next of kin, entitled in case of intestacy, only, and without reference to the paternal character, in any other view, that the right to prosecute must be contended for: for I see no sufficient legal ground to support the argument, which has been ingeniously contended for, that a father, *quâ* father, has any right whatever which is not equally incidental to other relations. Now, in following up this view of the question, two very important points suggest themselves; the first is, that the relationship of the party proceeding in the suit, may be denied, and a preliminary suit of interest, as it is called, may take place. The second is, that the relationship of the party proceeding in the suit may be that of a cousin, or any relation entitled, in case of intestacy, to share in the property of the party, to almost any degree of remoteness. I do not find that, either in the case, or in the argument, there is any preferential distinction on the ground of interest in case of intestacy. The point then is this: will the in-

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not in the paternal character, but as next of kin having an interest in case of intestacy.

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terest, in case of intestacy, be sufficient, without regard to the degree of relationship?

In my inquiries into this subject, I have endeavoured to ascertain whether this question has been decided in any former case by competent authority; for it would be a great relief to my mind, if I could truly say, that it had been so decided, and I had only to submit to the authority of precedent. In the case of "Faremouth and Watson," (a) the point incidentally arose; but it cannot be truly said that the Judge decided it. In that case the interest was a pecuniary and beneficial interest, there was a remainder to the person promoting the suit, contingent on one of the parties married dying without lawful issue. I have no hesitation in saying, that the learned Judge, the then Dean of the Arches, did consider that such was an adequate interest to enable the party to maintain a civil suit. Incidentally, a discussion took place, as to whether a person entitled to share in an intestacy, had a *persona standi* in a suit of this nature; but the question was not necessary to be decided, and it was not decided. The learned Judge, Sir John Nicholl, has had the kindness to let me look at his notes, and I find that, after a discussion of this question, the expressions which fell from him, were the following: "He was disposed to hold that such interest would be sufficient." I have the greatest deference and respect for the opinions of that learned Judge, and it is not necessary for me to say, that for any judgment he may have given, or opinion he may have expressed, I entertain the highest

(a) 1 Phill. 355.

regard ; but of this I am certain, that if I were to consider, under the circumstances, this as a binding determination upon me, he would be the first to blame me for so doing. I am sure he would think, that giving the utmost consideration to the discussion which has been had upon this point, I ought not to consider this as a *dictum* binding upon me as a precedent, but that I should look at the question on principle ; I should be doing him injustice if I imagined he entertained a different opinion. The next case is that of "Turner and Meyers." (a) That case certainly does not in any way settle this point, though I shall presently have to consider the judgment in that case, and its material bearing on the present. It is useless to state other authorities. After the fullest search I have been able to make, I find that by none of them has the question been definitively settled.

The next mode, then, after considering whether the law is settled or not, is to look at the practice of this Court ; to see whether there has been such long and uniform usage, in uncontested cases, as to enable the Court to place reliance on such usage, so as to hold it to a certain degree the law of the Court. I am enabled to say that, neither in number of precedents, nor on any other ground, is there any thing, in the practice of the Court, sufficient to lead me to any such conclusion.

Then, I am at last driven to consider and to decide this point on principle ; I am to determine whether an interest in case of intestacy be sufficient,—the words of the citation put it on this ground, as relates to the legitimacy of the children only,—that is the only point of the case now to be

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decided. The interest of a father, *quá* intestacy, might be as much affected, if there were a lawful husband, as by legitimate children. Is this the interest which the law contemplates? I see no means of tracing the origin of these proceedings, which are buried in the darkness of antiquity. The absence of all reports and information renders it impossible to say what was the true origin of the law on this point. At first, by our own law, these marriages were not only null and void, *ab initio*, but always continued so. It has been truly stated, that it was the interference of the Common Law Courts, which, in such cases, prohibited the Spiritual Courts from bastardizing the issue, after the death of one of the parties, that created the distinction—the very unnatural distinction—of voidable and void: for voidable is void, *ab initio*. Having nothing but conjecture to guide me, so far as I can conjecture, it may be supposed that, as by possibility the Judge might refuse to allow his office to be promoted, a civil form was therefore allowed to persons having an interest, to protect that interest, which would be otherwise damnified. But this does not lead me to the definition of the species of interest deemed sufficient. What is the test? How am I to try it? Whether is it a devisable interest, or transferable, or what else? Such an interest as this may be called *spes successionis*. I lay out of the question the fact, whether this lady actually had property, respecting which she might die intestate; because I am convinced that the right to sue never can depend on the fact.

In considering what the test should be, I am, to a certain degree, led to a branch of the law, with which we in these Courts are not very fa-

miliar, and respecting which, I entertain great difficulty in following up my examination. Suppose devisability to be considered a test. The distinction is, that contingent and executory interests may be devised, provided the person who is to take is certain, and the interest would be descendible, if not devised. This distinction is laid down in *Roe v. Jones*.^(a) Here, clearly, the interest would not be a descendible interest; it is one of a possible nature only, and not descendible. Is the test to be the power of contracting for the transfer of it? I feel that this is a subject which I am not able to investigate in all its ramifications. I do not know that I can come to the conclusion, that it is competent to any person to contract for the sale or transfer of this interest, even suppose it can be called an interest not subject to defeasance. I very greatly doubt the possibility of this being the true test: for, supposing such an interest capable of being transferred, I know not why another relation, having a strong hope of succession by the death of a nearer relation before the person in question, might not set up a claim; a father has an interest in case of intestacy, but a father has a degree less interest than a son. I will put a case: suppose a lunatic of twenty-five, a father greatly advanced in age, and a brother; the brother's indirect chance might be more valuable than the father's interest: yet if this were admitted, the consequence would be perfectly absurd, for it would travel *ad infinitum*; for any person, having an interest *spe successionis*, if it might be transferred, would be entitled to sue in a civil suit.

I do not like to venture an opinion as to what

^(a) 1 H. Black. 30. 3 T. R. 88.

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species of claim might be made the subject of contract in equity. Many things may be the subject of contract, which cannot be called an interest, though possibly valuable, as personal service, and covenant not to carry on business: is this an interest which would survive to an assignee in bankruptcy? I find in Scotland, where the Civil Law is in force, and has power to adjudicate for debt every species of property, that such a *spes successionis* is not capable of being adjudged for debt. Does this species of right or interest give a person, having it, the power to interpose in any case, or any right of action? For, after all, that is the point. In other words, has a person, interested in case of intestacy, a right of action, in respect to the property of the person who may hereafter die intestate? I apprehend not, except in case of lunacy; but that is distinguished from the present case; for in the case of a lunatic, the *spes successionis* may be said to be different in its nature, from the incapacity of the lunatic to make away with the property. Would a person have a right of action when the property belonged to an individual of sound mind? I apprehend, none whatever in law or equity. Then I am at a loss to understand why a right of action should exist in this case, and not under any other circumstances.

Is there any authority bearing on this point? I think there is, and that is the authority of Lord Stowell himself. It is not a decision on the point itself, but it bears on the point at issue. Lord Stowell says, in the case of *Turner v. Meyers*: “Cases of consanguinity have been also mentioned, but in those the public have an interest to abate a scandal.” The interest of the public in abating

a scandal is the ground of the criminal suit. "The criminal suit is open to every one ; the civil suit to every one shewing an interest ; but, in that respect, the father is by no means privileged, as he must shew a specific interest as well as any other person." Now what did Lord Stowell mean by these words ? I doubt extremely whether he meant by "specific interest" merely an interest in case of intestacy. "As well as any other person ;" I am inclined to be of opinion that Lord Stowell in these expressions, meant an interest of a different kind, a more direct interest than the one in question. I think, therefore, that to a certain extent, and not intending to press the authority of Lord Stowell too far, these particular words do appear to bear upon the present question ; and, not meaning to shelter myself under the shadow of a great name, if I am in the slightest degree in error, I think, so far as his judgment is capable of being applied to the present case, it supports the view I have taken of the question.

Then, if this be the true state of the case, if there be no authority in favour of the right to sue on such an interest in case of intestacy only ; if I must decide this point on principle, and if such an interest could not give a right of action in any other Court ; if I am bound to hold that it is a mere *spes successionis*, not entitling the party to interfere with the *status* of others by civil action ; (and I have come to this conclusion, that so far as I have carried my inquiries this is the true state of the case ;) then I am under the necessity of declaring that, in my opinion, Mr. Ray has not a sufficient interest to support the present suit.

The circumstance which was brought to my

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ARCHES COURT OF CANTERBURY.

RAY *against* SHERWOOD AND RAY.

JUDGMENT.

SIR HERBERT JENNER,

THIS case comes before the Court on an appeal from the decision of the Judge of the Consistorial and Episcopal Court of London, who has rejected the libel offered in a suit of nullity of marriage by reason of incest, brought by Mr. Robert Ray, father of Emma Sarah Ray, one of the parties in the cause, against Mr. Thomas Moulden Sherwood and Miss Ray, as having an interest (so the father describes himself) in the legitimacy or illegitimacy of her issue.

The question depends on the Act of Parliament recently passed with reference to marriages of this description, which were voidable—Mr. Sherwood having married (as it is alleged) the sister of his deceased wife. The citation in the original cause was extracted on the 24th August, 1835, and was personally served on both parties the same day, and was returned into Court on the 9th September, the court-day immediately following the day on which the citation was extracted and served. An appearance was given for one of the parties, Miss Emma Sarah Ray, on that day; no appearance was given for the husband till the 14th October. The Proctor then appeared for Mr. Sherwood, not under protest, but absolutely, and a libel was

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The service of a citation sufficient to constitute pendency of suit.

Held, that the father, *quod* father, has sufficient interest to enable him to a suit in the civil form, for the purpose of annulling the marriage of his daughter, when of age, reversing the judgment of the Consistory Court on this point.

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prayed. The libel was brought in, and subsequently additional articles. The admission of the libel and additional articles was opposed; the case was fully argued in the Court below, and the Judge finally rejected the libel on the 18th January, 1836. From this rejection of the libel the present appeal is brought, and the case now comes on for the opinion of this Court.

Before I proceed to consider the peculiar circumstances of the case, and the grounds of objection to the libel, it is proper to state the facts pleaded; because it may be very important to see what is the case set up, before the Court proceeds to apply the law to it. The libel in the first place pleads the marriage of the father and mother of the party in the present suit in October, 1799; the birth of several children, and amongst others, of a daughter, born on the 4th January, 1807, and baptised Anna Rachel Louisa, and who was the first wife of Mr. Sherwood. It then pleads the birth of another daughter, on the 14th June, 1812, who was baptised Emma Sarah, and who is the party in the present cause; so that, at the date of the marriage, she was not a minor, but of full age.

The libel then pleads the marriage of the elder of the two sisters on the 17th July, 1827, at the parish of St. George, Bloomsbury, by license, and that the issue of that marriage were two children, both now living. It pleads the death of Mrs. Sherwood, the first wife, on the 3rd April, 1834, and then sets forth the law applicable to the question before the Court, namely, that by the Law and Canons Ecclesiastical now in full force in this kingdom, particularly the 99th Canon of 1603, "it is ordered and directed, that no person shall

“marry within the degrees prohibited by the laws
 “of God, and expressed in a table set forth by
 “authority in the year 1563; and that all mar-
 “riages so made and contracted shall be judged
 “incestuous and unlawful, and consequently shall
 “be dissolved as void from the beginning; and
 “the parties so married shall by course of law be
 “separated.” It then goes on to plead, that “by
 “the first table of the degrees of marriage, set
 “forth by the Most Reverend Father in God,
 “Matthew Parker, by Divine Providence some
 “time Lord Archbishop of Canterbury, Primate
 “of All England, and Metropolitan, in the year
 “of our Lord 1563, it is expressly ordered that a
 “man may not marry his wife’s sister;” and it
 then refers to the canon and table.

In the 10th article it pleads the marriage now
 in question as having taken place on the 29th June,
 1835, in the parish church of St. Mary, White-
 chapel, in pursuance of banns published in that
 church only, “in which publication of banns both the
 “parties were described as of that parish, although
 “neither of them had ever resided in that parish.”
 —These words must be expunged from the libel
 before it can be admitted, the Court being express-
 ly prohibited by the Marriage Act, from inquiring
 into the residence of the parties in any suit touching
 the validity of a marriage once celebrated.—It also
 pleads the entry of the marriage in the register
 book: and further, that immediately after the
 ceremony, for the purpose of preventing the
 marriage coming to the knowledge of the father
 and her family, and as previously arranged, Miss
 Ray returned to her father’s house, and continued
 to live and reside with him and his family as she

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had thentofore done ; that she and Mr. Sherwood concealed from them the fact of marriage, as well as their previous intention to be married ; and that the same was not discovered till the 22d August following, the citation being extracted on the 24th of that month, the intervening day between the discovery and the 24th being a Sunday, so that no step could have been taken earlier after the marriage was discovered.

The 11th article exhibits the entry of the marriage, and pleads the identity of the parties (that is, that the person married by the name of Emma Sarah Ray to Mr. Thomas Moulden Sherwood, is the daughter of Mr. Robert Ray, and the sister of Anna Rachel Louisa Sherwood, the first wife of Mr. Sherwood.

The remaining articles are merely formal, pleading the jurisdiction of the Court, over the cause and the parties ; and the last article concludes with praying “ that the marriage so had may be pronounced and declared to have been and to be absolutely null and void to all intents and purposes in the law from the beginning, by reason of incest, in pursuance of and in conformity with the aforesaid 99th Canon, and laws Ecclesiastical of this realm ; and that the parties proceeded against may be condemned in the costs of the proceedings ” Annexed to the libel are copies of the entries of the several marriages and deaths pleaded.

In the course of the proceedings additional articles were given in, as I have already said, which pleaded, in supply of proof of the 10th article, namely, the concealment of the marriage from the father, a letter alleged to have been written by

Mr. Sherwood and addressed to Mr. Henry Ray, who, I presume, is a member of this lady's family, which is dated (and this is not immaterial) on the 17th August, 1835, the discovery of the marriage not being made till the 22d of the month; they go on to plead, that under the will of her maternal great uncle, the daughter of Mr. Ray is entitled to considerable property, and in supply of proof is annexed an extract from the will of her great uncle.

These are the contents of the libel and additional articles, and if what is there pleaded can be established by proof, it is quite impossible to say, that this is not a case which calls loudly for the interference of those Courts, to whose cognizance such questions properly belong. In the first place, this is a contract which is prohibited by the laws both of God and man—for so, sitting in an Ecclesiastical Court, I should be bound to consider it, even, if I were, as I am not, among the number of those who privately entertained any doubt upon the subject. In the second place it is a secret and clandestine marriage; perhaps not clandestine in the strict legal meaning of the term, for the term “clandestine” is applied by the law to a marriage where there has not been a due publication of banns, and I am not at liberty to enter into that question—but, morally speaking, and using the common acceptation of the term, it is a secret and clandestine marriage, purposely and studiously concealed from the knowledge of those who were directly interested to prevent one of the parties from entering into the unhallowed contract. Lastly, it is a case calling for the interference of the Court; because, as I collect from the libel, there

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has been no cohabitation of the parties since the marriage, so that it is not too late now for the Court to prevent the consummation of the offence, if the law has not placed an insuperable barrier to any proceeding for that salutary purpose.

That this Court would and ought to lend its aid and assistance towards the accomplishment of so desirable an object, cannot be doubted; and I have myself no hesitation in saying that I should feel great regret if I were to find myself placed in such a situation as to be obliged to reject this libel, and thereby in effect to pronounce that the validity of this marriage could not be questioned. What would be the condition of the parties and of the Court, if such should be its present decision? Mr. Sherwood would have a right to claim the *consortium* of his wife; and if she refused to cohabit with him, he would be entitled to institute a suit in these Courts, not for the purpose of compelling her to return to cohabitation in his house (for into it she has never entered as his wife), but to afford him the *consortium vitæ*, which she has withheld from him by his own consent from the date of the marriage to the present time. The Court would thus be accessory to the commission of that offence, of which there is every reason to believe she is at the present moment innocent. And when the Court has issued its *fiat* to compel her to cohabit with her husband, it may the next day, in another branch of its jurisdiction, be called upon to punish her for the very crime, to the commission of which the Court itself has been an instrument; for, looking at the words of the Act of Parliament, I am by no means prepared to say that, in prohibiting the Ecclesiastical Courts from annulling marriages of this

kind, subsisting at the time of the passing of the Act, the legislature has altered the law in any other respect.

I am not prepared to say, that the parties may not be punished by the Ecclesiastical Law for the incest, though the validity of the marriage cannot be called in question. How stood the law before this Act of Parliament? Originally, as now, these marriages were void *ab initio*, when sentence was pronounced by the Ecclesiastical Court: and it appears that the Ecclesiastical Courts were in the habit of annulling these marriages, even after the death of the parties, after the death of both, or of one only. And this seems to have been the practice antecedent to the Canon of 1603, as will be evident from a reference to the *Articuli Cleri*, (a) by Archbishop Bancroft, in the 3d James I., (in the year 1606) whence it appears that the practice had existed for a long time before, and that the Ecclesiastical Courts complained of the interference of the Temporal Courts in cases of Ecclesiastical cognizance, and, amongst others (in the 20th article), “that a prohibition had been awarded in a “case of an incestuous marriage, suggesting, under “pretence of a Statute of Henry VIII., that it ap- “pertained to the Temporal Courts, and not to the “Ecclesiastical, to determine what marriages are “lawful, and what incestuous, by the Word of “God.” To which the answer of the Twelve Judges was, “That these were cases that we (the “Temporal Courts) may deal with, both with mar- “riages and deprivations; as where they (the Ec- “clesiastical Courts) will call the marriage in ques-

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“tion after the death of any of the parties: the
“ marriage may not then be called in question,
“ because it is to bastardize and disinherit the issue,
“ who cannot so well defend the marriage as the
“ parties, both living, might themselves have done.”
The practice, then, clearly existed at that time of
declaring these marriages void after the death of
the parties, and the Temporal Courts interfered for
the purpose of protecting the interest of the issue
of such marriages, and not that of the guilty par-
ties; for as it appears from the case of *Harris v.*
Hicks, (a) in the 4th and 5th of William and Mary,
where a man had married the sister of his deceased
wife, and it was suggested that the second wife was
dead, and a son, the issue of the second marriage,
would be entitled to lands; the Temporal Court in
that case issued a prohibition against these Courts
proceeding to annul the marriage between the par-
ties after the death of one of them, *but it did not*
prohibit them from punishing the survivor for the
incest committed during cohabitation.

If this, then, was the state of the law at that pe-
riod, what has occurred to alter it since? Nothing
but this Act of Parliament, passed on the 31st
August, 1835, the 5th and 6th of William IV., so
often adverted to in the course of these proceedings.
What did this Act of Parliament do? The title of
it is, “An Act to render certain marriages valid,
“ and to alter the law with respect to certain void-
“ able marriages.” And if the object of the Act
had been to declare all such marriages existing at
the time of the passing of the Act, notwithstanding
they were originally illegal, good and valid mar-

(a) 2 Salk. 548.

riages to all intents and purposes (as has been contended it does by the learned counsel for Mr. Sherwood), it might admit of a question, whether, under such circumstances, this Court could punish the parties for incestuous cohabitation; but the enacting part of the Act does not declare any such thing. After declaring in the preamble—"Whereas
 "marriages between persons within the prohibited
 "degrees are voidable only by sentence of the Ec-
 "clesiastical Court, pronounced during the lifetime
 "of both the parties thereto, and it is unreasonable
 "that the state and condition of the children of
 "marriages between persons within the prohibited
 "degrees of affinity should remain unsettled during
 "so long a period, and it is fitting that all mar-
 "riages which may hereafter be celebrated between
 "persons within the prohibited degrees of con-
 "sanguinity or affinity should be *ipso facto* void,
 "and not merely voidable;" then, in the enacting part of the Act, I find these words:—"Be it
 "therefore enacted, that all marriages which shall
 "have been celebrated before the passing of this
 "Act between persons being within the prohibited
 "degrees of affinity, shall" not be good and valid to all intents and purposes, but "not hereafter be
 "annulled for that cause by any sentence of the
 "Ecclesiastical Court, unless pronounced in a suit
 "which shall be depending at the time of the pas-
 "sing of this Act:" and the Act has nothing to do with marriages within the prohibited degrees of consanguinity.

The enacting part of the Act does not declare these marriages to be good and valid to all intents and purposes, as might be supposed from the title of the Act; and although the title, as well as the

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preamble, may be important where there is any doubt or ambiguity in the enacting part of a statute, when a reference may be made to the title and preamble for the purpose of explaining such doubt and ambiguity; but the title can give no effect to the enacting words of a statute, where those words are plain and unambiguous. I apprehend that they are independent of the title, which can have effect only so far as to obviate and explain doubt or ambiguity in the enacting part of a statute. I do not think, where the enacting part of the statute is to the effect "that all marriages which shall have been celebrated before the passing of this Act between persons being within the prohibited degrees of affinity, shall not hereafter be annulled for that cause by any sentence of the Ecclesiastical Court," that this amounts to a prohibition to the Ecclesiastical Court to punish the parties under another branch of the law for incestuous cohabitation. I apprehend the law is not altered in this respect, and that the Court is not prohibited by this Act from punishing parties for such cohabitation, although it cannot declare the marriage null and void.

Again, if we look to the preamble of the Act, it is not for the protection of the parties who have been guilty of the offence, for such it is by the Ecclesiastical Law and by the law of God, but for the protection of the children, for that is the purpose and object of the Act, to settle the state and condition of the innocent issue of such marriages, not to screen the delinquent parties. But whatever may have been the intention of the Legislature, and whatever may be the effect of this Act of Parliament, the marriage had between the two parties,

Thomas Moulden Sherwood and Emma Sarah Ray, is an incestuous marriage, and must ever so remain. The law of God cannot be altered by the law of man. The Legislature may exempt the parties from punishment; it may legalize, humanly speaking, every prohibited act, and give effect to any contract, however inconsistent with the Divine law, but it cannot change the character of the Act itself, which remains as it was, and must always so remain, whatever be the effect of the Act of Parliament.

I have adverted to these points, which are not immediately connected with the real issue to be decided by the Court, in consequence of something which occurred during the argument, suggesting that the Court was bound to submit in this matter to the expressed opinion of the Legislature; and undoubtedly the Court would, if the intention or the opinion of the Legislature were clearly and expressly declared, be bound to follow the advice given to it; so that it was not immaterial for the Court to endeavour to ascertain what its true and real meaning was; and I am not prepared to say, looking at the Act of Parliament, that the Legislature has declared any opinion that such marriages are not contrary to the Divine law—on the contrary, I think the Act itself shows, that the Legislature entertained no opinion of the kind—for what is the fact? it says, that “all marriages “which shall have been celebrated before the passing of this Act,” that is, the 31st August, 1835, “between persons being within the prohibited degrees of affinity, shall not hereafter be annulled,” and so on. But after having stated in the preceding section the inconveniences arising from the ex-

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isting state of the law, and the prejudice which the children, the issue of such marriages, who are innocent, sustain thereby, it goes on to enact "That all "marriages which shall hereafter (that is, after the "31st August, 1835) be celebrated between persons within the prohibited degrees of consanguinity "or affinity shall be absolutely void to all intents "and purposes whatsoever." So that instead of expressing an opinion tending to show that it considered such marriages innocent, and that they are not contrary to the Divine law, the Legislature rather affirms the proposition, by declaring all such marriages in future "absolutely null and void to "all intents and purposes whatsoever." The Legislature has expressed, as strongly as it could do, that these marriages are still illegal and contrary to the law of God; although, for the protection of innocent parties, not to screen the delinquents, it has declared, that those marriages shall be unquestioned, which were celebrated at the time of the passing of the Act, under the particular circumstances and conditions mentioned in the first section. But this is not a question which the Court is called upon to determine, and it is therefore not necessary to proceed further into the consideration of it.

It is proper now for the Court to consider the grounds upon which the admission of the libel, which is now before the Court, has been opposed by the counsel for Mr. Sherwood—for Miss Ray (under which name I shall call her, as there is no necessity for describing her as falsely called Sherwood, but I shall call her by her original name, her father's name, to which she is entitled until this marriage is pronounced good and valid) has

shown herself desirous to retrieve the error into which she has fallen ; she does not oppose the admission of the libel.

The grounds of objection are two—first, that by the recent Act of Parliament, the Ecclesiastical Court is prohibited from entertaining this question ; and, secondly, that the party promoting the suit has no such interest as will entitle him to appear and pray the interference of the Court to declare this marriage null and void. The first of these questions will depend upon the construction of the Act of Parliament ; the second, upon general principles which are not affected by the statute. Both have been argued with great talent, zeal, and industry, by the counsel on both sides engaged in the cause (if I am so entitled to call it), and the Court has been referred to a variety of authorities, writers on the practice of the Courts, foreign and domestic, who have treated of the practice of Courts proceeding according to the Roman Civil Law ; and it has also been referred to the decisions of Courts of Law and Equity ; and in short, no pains have been spared to furnish the Court with every information which could be deduced from any source which could bear upon the questions.

The Act of Parliament uses the phrase “all marriages” which is perhaps a little extraordinary, and looks as if the legislature had originally intended to say “all marriages should be good and valid,” and had afterwards altered its intention ; for it says, that “all marriages shall not hereafter be annulled,” which is a strange phraseology in an Act of Parliament ; the meaning clearly is, that no marriage shall be questioned on this ground, which shall then have been celebrated, unless

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under particular circumstances. But it is necessary to see what the words of the act are : “ that
“ all marriages which shall have been celebrated
“ before the passing of this act, between persons
“ being within the prohibited degrees of affinity,
“ shall not hereafter be annulled for that cause by
“ any sentence of the Ecclesiastical Court, unless
“ pronounced in a suit which shall be depending
“ at the time of the passing of this act.”

The first question then to be considered is, what did the Legislature mean and intend by the words “ *suit depending in the Ecclesiastical Court* ?” It is contended, that these words have a technical sense applied to them ; that they are words of art ; and being words of art, and being used in reference to proceedings in the Ecclesiastical Courts, the Legislature must be supposed to have used them in the sense applied to them by these Courts ; and for the purpose of ascertaining the real meaning of these words, the Court has been favoured with long and elaborate arguments, fortified and sustained by reference to the various authorities, foreign and domestic, to which I have alluded ; and it has been contended from all these authorities, that by “ a
“ suit depending in the Ecclesiastical Court,” must be meant and intended a *lis pendens* (the technical term in these Courts), and that there is no *lis pendens*, and can be no *lis pendens*, until there has been a *contestatio litis* ; and as a necessary consequence, that as there has not been any *contestatio litis* in this case, there can have been no *lis pendens*, and consequently no suit depending in the Ecclesiastical Court, at the time of the passing of this act.

I confess, it was not without some surprise that I

heard the enunciation of this proposition. Having had considerable experience in these Courts, and knowing how much it is in the power of an unwilling party to protract the arrival of the cause at this stage of the proceeding to a very late period of time, I confess it did appear to me somewhat strange to hear it gravely suggested and gravely argued, that the words "suit depending in the Ecclesiastical Court" meant a *contestatio litis*; and to hear it as gravely suggested and argued, that the Court could not pronounce a sentence annulling a marriage of this description, unless there had been a *contestatio litis* at the time of the passing of the act, and that the sense in which the Legislature must be supposed to have used these words, would necessarily have the effect of defeating its own purpose; because I think, if that is the sense in which the Legislature used the words, it was almost impossible for any individual to be brought within the exception of the prohibitory clause.

If the terms are to be interpreted in the technical sense in which they are understood in the Ecclesiastical Courts, it would have been most difficult for the Legislature to have satisfied itself, by a laborious investigation of the practice of these Courts, as laid down in the books of authority, and by consulting the foreign commentators on the Roman Civil Law, that it had arrived at a definite and satisfactory result; it is almost absurd to suppose, that the Legislature should have resorted to such sources of information for that purpose; and little less absurd to suppose, if it had, that it could have arrived at a satisfactory conclusion as to what a *lis pendens* is, according to the writers on Ecclesiastical law, and the practice of those Courts

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which have adopted the Roman Civil Law ; for I am yet to learn from the authorities that have been cited, what is the express equivalent of, or the meaning attached to, the phrase *lis pendens*. But I do not think it necessary to go into any of these authorities ; I have not looked into them for that purpose, for I am satisfied that it could not have been the intention of the Legislature to use the words in a technical sense ; and I am sure that the gentlemen of this bar, who are Members of Parliament, would have been extremely surprised if they had heard, in the discussions on this bill in the House of Commons, any thing about the *lis pendens*, and that it was not till the *contestatio litis*, and that the *contestatio litis* would have the effect of protracting the period almost indefinitely, and that it would prevent any party from availing himself of the exception. I believe it never was the intention of the Legislature to give these words the narrow and technical sense attributed to them by the learned counsel for the Respondent, but that the words were used in their common every day and popular meaning ; that they were meant to exclude from the prohibitory enactments of the statute those who having rights had asserted those rights with a view of annulling marriages of this description.

What would be the consequences of a different construction of the Act of Parliament ? Would it not lead to the most absurd consequences ? First, with reference to the present suit—not suit, for I am not entitled to call it so—I am told there is none, that there is no suit depending, though it has commenced. When did the suit commence ? The citation was taken out on the 24th August last year, and was personally served on both parties the same

day ; it was returned into Court on the 9th September ; and here we are now on the 12th July, 1836, nearly eleven months after, it is admitted, the suit commenced, debating *whether there is a suit depending or not* ; and I see no reason why this question should not continue under discussion for another twelvemonth, or indeed for an almost indefinite period of time, if the party is willing to avail himself of all the delays which the forms of legal proceedings afford. Let us see what steps have been taken in the cause. I have already said that a citation has been taken out in the cause, and returned by the party on the 9th September, the earliest possible period. (And here I may notice that Mr. Ray is not one of those fifty persons who it was said might be lying-by to avail themselves of citations already taken out, if the Court should decide that this was a suit depending at the time of the passing of the Act ; he did not provide himself with a citation for such a purpose ; and if such instances should occur, the Court would know how to deal with them ; but Mr. Ray, acting for the interest of himself and his daughter, at the earliest possible period, took the requisite step for asserting that interest, and I have no doubt whatever, that in this proceeding, he is actuated by none but the purest and sincerest motives, to protect the issue of the marriage of his daughter. The citation being served on Mr. Sherwood, the other party, an appearance was given for him on the 14th October, not under protest, but absolutely (thereby admitting the jurisdiction of the Court, and that the Court was not precluded by the Act of Parliament from proceeding in this cause of nullity of marriage) ; and this was no hasty step on

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his part, for he took six or seven weeks to consider whether or not he should submit to the jurisdiction of the Court ; for though the citation was served upon him on the 24th August, there was not any appearance given on his part till the 14th October; and then he appears by his proctor, and authorizes him to pray a libel, which was the necessary step to bring the case to a conclusion, showing that the objection to the jurisdiction of the Court, on the ground that there was no suit depending in these Courts, was an after thought, and that it did not occur to any one of his legal advisers in the first instance to make this a ground of defence, and of objection to the jurisdiction of the Court. This objection, however, was brought forward in long and learned arguments, when the opinion of the Court was taken on the admissibility of the libel. All the circumstances of the case thus came before the Court, and these circumstances are not immaterial for the consideration of this Court. Mr. Sherwood has, therefore, admitted the right of the father to appear for the purpose of instituting a suit to annul this marriage, when he authorized his proctor to appear absolutely ; and all the circumstances of the case being now before me, I must say, that if the letter annexed to the additional articles was written by Mr. Sherwood, I do not think the counsel has used too strong terms in describing it as an act of deep hypocrisy on his part. This marriage took place on the 29th June, 1835 ; it was carefully concealed from the knowledge of Mr. Ray, as far as the parties could conceal it. The daughter returns to her father's house in the same circumstances as before, there being no cohabitation of the parties ; she continues to be an inmate of her

father's family; she resides under his protection; she is supported and maintained by him down to the present period; her character appears the same as before; Mr. Sherwood does not claim her as his wife; she does not assume the name of wife, nor is she so regarded by any other member of the family, in the house at the time; he takes every means of concealing the fact from the knowledge of the other party; and he writes on the 17th August, five days before the marriage was discovered, a letter to a member of the family, which I do not go too far in saying, must have been composed for the purpose of lulling suspicions (which may have been excited as to his intentions towards this daughter, which may have been observed by the family) until there was an end of all hopes of annulling the marriage by the passing of the Act of the Legislature. I do not suppose that Mr. Sherwood had any superior means of knowing what was going forward in either House of Parliament. It has been said, that the bill excited a great sensation, and no doubt it was calculated to do so; and it is not unlikely that Mr. Sherwood's attention was called to it, and that he was induced to set on foot this marriage of the 29th June; and if he did address this letter on the 17th August, I can only say, that it is properly described as an act of deep hypocrisy, and that he has no right to expect any favour at the hands of the Court. The Court is bound to apply the law equally in all cases, and he is entitled to the benefit of all the law allows him; but nothing further than that can be expected on the part of Mr. Sherwood.

But what have been the proceedings here? The whole process in the Court below is now before this

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Court, and it appears that a libel was prayed and brought in ; its admission being opposed, it was debated in long and elaborate arguments, proceeding on the same grounds and the same authorities as on the present occasion ; and the learned Judge of the Consistory Court of London took ample time to consider his decision ; and the result was, that he rejected the libel, thereby putting an end to the proceedings in the cause, if his judgment had been final ; but, as I understand and collect from the arguments, not on the ground that there was no *lis pendens*, but on the other ground, of the insufficiency of the interest of the father to sustain the suit ; but still I am told that, although a libel has been prayed and brought in, and though the admission of that libel has been debated, there is no suit depending in these Courts ; and the result is, that if all these proceedings had taken place before the passing of the Act, and the Judge had thought the libel proper to be admitted, and the proctor had even been assigned to give an issue to the libel : still the meaning of the Act of Parliament is, that all these proceedings amount to nothing, and that there is no suit depending in these Courts. Nothing surely can be more monstrous.

If the legislature intended by dependency of suit a *lis pendens*, and there is no *lis pendens* till a *constatio litis*, nothing can be more absurd than such a state of things ; but in fact, the absurdity does not end here, nor with the decision of the Chancellor of the Consistory Court of London ; for this Court is now in possession of this cause, on the 12th July, 1836, in the same shape and form as it was in the Court below, in Michaelmas Term, 1835. An in-

hibition was served on the Court below (or rather two inhibitions, for the party appeared under protest, and the Court sustained the protest as to one, and overruled the other, and therefore the whole of the time which has elapsed, is not attributable to the ordinary proceedings in the cause, part of the time having been occupied in the consideration of the protests to the inhibition); but an inhibition was served, the party appeared, proctors were constituted under the hands and seals of the respective parties, and the proctor for Mr. Ray has brought in a libel of appeal, at the prayer of the proctor for the other party, Mr. Sherwood. To this libel of appeal an issue has been given, so that there is a *contestatio litis* in the cause of appeal, though not in the principal cause in the Court below. The libel being given in, was admitted without opposition, and an issue was given; the proctor for the Appellant was assigned to prosecute his appeal, and the process is brought in, which is the ordinary practice in an appeal from a grievance; the process or copy of the proceedings in the Court below being the proof of the libel of appeal, (and there can be no other proof, for in an appeal from a grievance, the proof consists in the acts of the Court below), these proceedings have been brought into this Court, and amongst them the libel in the principal cause, which was the subject of discussion in the Court below. The admission of this libel has been discussed and debated here, and this Court is now called upon to say, whether the Judge of the Court below did right in rejecting it, or whether he ought not to have advanced one step more towards giving existence to this suit, by admitting the libel. For, strange to say, we are

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gravely told, after all these proceeding in the original cause and in the Court of Appeal, the suit is not yet in existence, has not yet struggled into birth, but, though it has been "dragging its slow length along" since its commencement, it has not advanced yet so far as to be "a suit depending in these Courts."

Again, suppose this Court should decide that the Court below did right in rejecting the libel, Mr. Ray might not be disposed to abide by that decision, and might choose to take the opinion of the Court of Appeal, the judicial committee of the Privy Council; or, on the other hand, if the Court should be of opinion, that the Judge of the Court below did wrong, and ought to have admitted the libel, Mr. Sherwood might choose to appeal from the decision of this Court, and to take the opinion of a superior Court. In either case the same steps must be taken again, as when the case was appealed to this Court: an inhibition must be taken out with a citation, and a monition to this Court to transmit the process to the superior Court; the process must be transmitted, the proctor for the party must appear and exhibit his proxy, and pray a libel; the libel must be brought in, and an issue given to the libel of appeal, and the same course of proceeding must be adopted as in this Court: and after all this time consumed, the question will remain in the same state as it did in the Consistory Court of London on the 18th January, 1836, namely, whether there is any suit depending or not.

I cannot believe that there was any intention on the part of the Legislature to use these words in a technical sense; but supposing that the intention of the Legislature was so, is it clear what the tech-

nical meaning is ; and is the Court to refer to all the various authorities in order to endeavour to ascertain the technical meanings attached to the words ? It is by no means my intention to go through the numerous authorities (no light reading for the dog-days), in order to dive into the meaning of these learned commentators, which, as far as the Court has examined their works, would lead to no satisfactory conclusion. I confess that what was cited in the argument, would not lead the Court to place any great dependence upon what is to be derived from the disquisitions and divisions of these learned writers, as to the proceedings in those Courts which are governed by the practice of the Civil Law ; and I think I can find, with reference to the proceedings of this Court, sufficient to say what a “ suit depending ” is, according to the proceedings of these Courts, from which I have always understood, and have no doubt, that the practice of these Courts is best learned. I have always understood, that from the instruments in the proceedings of these Courts, we can ascertain the practice of the Courts ; and what are the instruments which have been employed in this suit ? Referring to the process in the Consistory Court of London, I find a proxy exhibited on behalf of one of the parties cited, Miss Emma Sarah Ray ; and that expressly recites, that a cause was depending there. This occurs in the very first line of the proxy : “ Whereas a suit of nullity of marriage is depending and undetermined in judgment in the Consistorial and Episcopal Court of London.” That is the first thing I find in the proxy of one of the parties to this marriage, who is willing to retrieve the error she has committed, and to give effect to

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the prayer of her father, to have this marriage pronounced null and void, and she authorized her proctor to give an affirmative issue on her behalf. I grant that Mr. Sherwood is not bound by any admission in the proxy of Miss Ray, the other party, and I know his proxy is conceived in different terms, and I give his legal advisers credit for the caution which they have used ; for Mr. Sherwood's proxy merely recites, that "a citation has issued," and authorizes his proctor to appear to that citation : but let us see how the proceedings stand, when the case is brought by appeal here.

When an appeal is alleged, *apud acta*, there is no recital of there being a cause depending. The next step is, when the inhibition is returned, and an appearance given (for I do not proceed to consider what took place under the protest). The proxy authorizing the appearance of the proctor for Mr. Sherwood in this Court, is different from that in the Court below ; and hence I am led to imagine, that in the opinion of the learned counsel for Mr. Sherwood, who advised him in the first instance to object to the jurisdiction of the Court below, on the ground of there being no suit depending in that Court, the decision of that Court was satisfactory, and that he had not intended to urge the same objection ; and it does appear as if I was warranted in such conclusion ; for I find, that there is not the same caution used in the proxy itself in this Court : it runs "Whereas there has been a
 "certain pretended suit of nullity of marriage
 "depending and undetermined in judgment in the
 "Consistorial and Episcopal Court of London."
 So that here the term "pretended" is introduced, which is merely a word of form ; but still if it is

a pretended suit, there was a suit of some kind depending ; and this is the ordinary form of proxy which is used on all occasions. Again, I find, when the parties are before this Court by their proctors so constituted, and authorized to appear, it is in an appeal from a grievance, in a cause “ depending and undetermined in judgment in the Consistorial and Episcopal Court of London.”

The next step is the libel of appeal ; and what does that state ? True, it is the libel of appeal of Mr. Ray, and not of Mr. Sherwood : but it is in the same form as in other cases, and it sets forth that a suit was lately depending and undetermined in judgment in the Court below, and that an appeal has been instituted ; and now the objection to the admission of the libel is, that there is no suit depending in the Ecclesiastical Court, though the proxy of the party objecting to the admission of the libel, in his very first instrument, recites the pendency of a suit in these Courts. It may be said, that the libel of appeal is an instrument drawn up by the party whose interest it is to establish the jurisdiction of the Court, and to show that there was a cause depending. This is true ; and in order to meet this objection, the Court directed libels of appeal to be looked up in other cases of a similar description by other parties. I find a case which I think has much the same complexion as the present, which was decided in the Court of Arches by my predecessor in this chair ; the case of *Balfour against Carpenter* (a), which is reported in the first volume of Dr. *Phillimore's Reports*. It was an appeal from the Consistorial

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and Episcopal Court of Exeter, from the rejection of a part of the libel in a suit of nullity of marriage, by reason of the license having been granted by a person who had no authority to grant it, and a part of the libel was rejected, and from that rejection an appeal was brought to this Court. I find the appeal is stated in this way. It was a business of appeal and complaint by William Balfour, of a grievance; and in the libel of appeal is stated—“that it was a suit depending in the Consistorial and Episcopal Court of Exeter, in a certain cause of nullity of marriage,” in which the Judge of that Court had rejected one of the articles of the libel, and from such rejection an appeal was brought to the Court of Arches. I have now before me the original papers in that appeal, and I find that the libel sets forth as I have stated, that it was an appeal in “*a cause depending*” in the Court below; and it recites these words—“a cause of nullity of marriage depending in the Consistorial and Episcopal Court of Exeter;” and therefore it is not the form of proceeding in this cause only, but it is the customary form (and I may say the regular form), and it is the same in all the cases to which I have referred—and many other cases might be produced, for the form is the same in all cases of appeal: in all, the expression is “a suit depending” or “a cause depending,” in respect to the question on which the appeal is brought, and the form is not peculiar to this Court. So much for the common sources of information from which we are accustomed to derive our knowledge as to the practice of these Courts, all of which concur in stating “a cause depending,” notwithstanding that, in an appeal from a grievance

on account of the rejection of the libel, there can have been no *contestatio litis*, and consequently, according to the argument of the learned counsel for the Respondent, there can have been no suit—no *lis pendens*. But in all these cases, a cause is described as “depending” before the *contestatio litis*.

If it was necessary to cite authorities, I should like to refer to domestic writers, those who more particularly treat of the practice of the profession, deriving their knowledge from experience; and there is one authority which I will advert to, and only one, which supports the view I have taken, and which is in opposition to the argument used against the admission of the libel. I mean Oughton, in his *Ordo Judiciorum*, not that part in which he sets forth the different stages of a suit, or parts of the *judicium* (for writers differ from each other, and there is some confusion between the *causæ* and the *judicium*, even the authorities so much adverted to in the argument, and which, though foreign writers, are said to be guides as to our practice), but in that part where he treats of the order of proceeding in matrimonial suits. That authority (not in the passages which have been adverted or referred to by the counsel for Mr. Sherwood, but in another part of his treatise), speaks of proceedings “*lite pendente*,” where there could have been no *contestatio litis*, and even before the return of the citation. In Title 198, where he treats *De Citatione in Causâ Matrimoniali*, I find it thus laid down by him:—“Si agens in
“*causâ matrimoniali credit vel dubitat partem ream*
“*citandam velle (lite pendente) ad alia vota convo-*
“*lare (id est, cum alio aut contrahere aut solemui-*

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“zare matrimonium,) curare potest ut in citatione
 “inseratur inhibitio contra partem ream ne (*lite hu-*
 “*jusmodi pendente*) convolet ad alia vota; matrimo-
 “niumve aliunde quovis-modo contrahat, et quod
 “si de facto antea contraxerit (id est, ante execu-
 “tionem citationis,) illud in facie Ecclesiæ solem-
 “nizari non procuret, sub pœnâ juris et con-
 “temptus.” So that, in a proceeding *in causâ*
matrimoniali, if the party against whom the suit is
 instituted “*lite pendente*” enters into a contract of
 marriage with another person, the other party has
 a remedy, and this pendency of suit is *ante execu-*
tionem citationis; so that here is a *lis pendens* re-
 ferred to before a *contestatio litis*. Again, in Title
 201: “Si mulier contra quam agitur in causâ
 “matrimoniali, non obstante pendentia litis et inhi-
 “bitione (quod *lite pendente*, non convolaret ad
 “alias nuptias), matrimonium solemniserit vel
 “matrimonium contraxerit cum alio; hoc allegato
 “et probato est sequestranda (sumptibus petentis,) *lite*
pendente.” And there are several other
 parts of the section *De Causâ Matrimoniali* which
 speak of a breach of the inhibition “*pendente lite*.”
 In Title 31, “*De Contemptu*,” is this “De modo
 “petendi decretum in negotio contemptûs in causâ
 “matrimoniali; nempe propter solemnizationem
 “matrimonii (*pendente lite*) inhibitione judicis in
 “contrarium non obstante.” Again, after re-
 citing the issuing and serving of the citation with
 the inhibition, it proceeds:—“Quodque (vestris
 “literis inhibitoriis, et executione earundem non
 “obstantibus) ipsa, *post executionem* earundem (in
 “contemptum juris et jurisdictionis vestræ non
 “ferendum) matrimonium quoddam prætensum
 “(de facto) contraxit cum quodamvis et illud in

“ facie Ecclesiæ solemnizari seu potius profanari
 “ curavit.” It would seem to follow from these
 passages, that this writer considered that there was
 a *lis pendens* after the issuing the decree or ser-
 vice of the citation ; but it is impossible he could
 have had in view, in speaking of these proceedings,
 the *contestatio litis* ; for, according to Oughton, the
 contempt is founded upon the breach of the inhi-
 bition after the service of the decree.

So that it appears, with reference to the custom-
 ary form of the instruments in proceedings in these
 Courts, and also to the authority of Oughton, who
 has been relied on as an authority for the general
 practice of these Courts, that the *contestatio litis*
 is not necessary to constitute a *lis pendens* ; that
 there may be “ a suit depending in the Ecclesias-
 “ tical Court” before the *contestatio litis*, and that
 the *lis pendens*, according to this authority, com-
 mences with the extracting and service of the
 citation ; and if not, by analogy with other Courts,
 on the return of the citation, whenever it may be.
 To be sure, we may suppose a case in which there
 would be great hardship. For what is the fact ?
 Till a late period it was not in the power of the
 Consistorial Court of London to appoint additional
 court-days ; and, supposing that the sittings of the
 Court were over, no proceedings could have taken
 place till the first Session of Michaelmas Term
 following ; and the party without any fault of his
 own, would have been precluded from the benefit
 of the exception from the prohibitory clause in the
 Act. I consider, then, in the first place, that it is
 not a technical meaning which we are to apply to
 the words “ suit depending in the Ecclesiastical
 “ Court,” no such technical meaning being intended

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by the Legislature ; and, secondly, I am of opinion that, if these words were to receive an interpretation according to the technical rules of practice of the Court, they would not take away the jurisdiction of this Court.

I therefore entirely agree in opinion with the Judge of the Court below on this point—that the jurisdiction of the Court is not taken away by the Act of Parliament on the ground that there was no suit depending, touching the validity of this marriage, at the passing of the Act, which is requisite in order to bring it within the terms of the exception of the Act, which requires that the sentence of nullity should be pronounced in “a suit which shall be depending at the time of the passing of this Act.”

I have now made an end of the observations, perhaps long observations, upon the objection to the jurisdiction of the Court ; and after the learned and elaborate arguments that have been addressed to it on that point, it seemed necessary to consider this question fully ; for if the Court's jurisdiction is taken away, and it has no power to pronounce a sentence annulling the marriage, it is quite unnecessary to consider the other objection, whether Mr. Ray has such an interest as will entitle him to institute a suit, and to pray a sentence of the Court, pronouncing this marriage null and void ; and I now proceed to consider the second ground of objection to the admission of the libel and additional articles, namely : the right of the father to institute these proceedings.

I have already said that this question depends in no degree on the Act of Parliament. If the Court has jurisdiction to entertain this suit, the father has

the same right to institute a suit on the ground of affinity as on the ground of consanguinity ; and if the Court is called upon to pronounce a declaratory sentence in respect to a marriage between parties within the prohibited degrees of *affinity*, the Court cannot pronounce against the right of the father, without pronouncing against his right to institute proceedings in respect to marriages between parties within the prohibited degrees of *consanguinity*, which the legislature has left untouched ; so that the question is not confined to the present case, but may occur in others.

I must observe that, in considering this part of the question, I do not feel the same confidence as I did in respect to the former part, and for this reason ; on this part of it I have not the same consolation that my opinion is consonant with that of the learned Judge of the Court below. In the former part of the case our opinions agree ; but in this I have the misfortune to differ from his opinion, that the father has not a sufficient interest to institute the suit. After the learned and elaborate arguments which I have heard, and after considering the question, as I hope, maturely and conscientiously, I have arrived at another conclusion ; and though I entertain great respect, and regard, and esteem, for the knowledge, and talents, and accuracy, of that learned person, I am bound to declare my own opinion, though it differs from that of the learned Judge. I hardly need to say that I feel the misfortune of differing from him ; and it would have been a great comfort to me, if he had arrived at the same conclusion as I have done.

This part of the case requires great consideration, and it appears to me that the arguments of the

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counsel on this point (if the expression is not too strong) proceed on a fallacy: their arguments go on a supposition that it is a pecuniary interest which a father is bound to show. I have been referred to proceedings in other Courts, to show that a father, *quâ* father, is not allowed to bring an action for damages against the seducer of his daughter; and other cases, in which a father, *quâ* father, has no such right, have been mentioned to the Court; and great stress has been laid upon *this*, that a father's interest, as next of kin, is not such an interest as will entitle him to institute a proceeding of this description.

Before I proceed to examine the law of the case, the situation of the parties is worthy of consideration; and it is to be observed that Miss Ray was of full age, and had a right to contract marriage without the consent of another, and that if this is a legal marriage in other respects, she was *sui juris* and had a perfect right to contract it herself. But the question is, whether, after contracting a marriage of this description, prohibited by the laws of the country, and of God, and admitting that it can be set aside by a suit in the Ecclesiastical Court, the question, I say, is, whether the father, under these circumstances, is not entitled to institute a suit for that purpose, she being at the time of the marriage, and being still, *resident in his house, and forming a part of his family*, whether *that* is not a sufficient interest, the "specific" interest mentioned by Lord Stowell, in the case of Turner and Meyers (*a*), or whether that learned Judge meant, in that case, that a father, like other

(a) 1 Cons. Rep. 414.

persons, should set forth a *specific pecuniary interest*, to entitle him to institute such a suit. It does not appear to me that this is the sort of interest which the father is called upon to set forth.

It is admitted that there is no case which decides this point. The case of Turner and Meyers does not decide it. That was a marriage sought to be set aside on the ground of insanity; the law had to decide the *status* of the party. A marriage where a party is insane is no marriage at all; so that different considerations apply to the two cases: and if Lord Stowell had said (though it appears to me he has not said so), that in such a case a father without a pecuniary interest would not be entitled to institute a suit to procure a sentence of nullity, the same considerations do not apply to this case. On the other hand, I am not prepared to say, that there is any case which has determined that a next of kin, *quâ* next of kin, with a *spes successionis*, has been in express terms considered to possess a sufficient interest applicable to a proceeding of this kind. The case of Faremouth *v.* Watson, (a) is the nearest to it, but it is the only one. But still, in that case, after the explanation I have had, I am bound to consider that the point was not decided by the learned Judge (Sir John Nicholl), though there was a strong impression upon his mind (as I collect from what has been said on one side and the other, in the course of the argument), that such an interest would be sufficient; he is said to have thrown out that a "slight interest" would be sufficient; and the question is, what is that "slight interest?"

All the arguments on behalf of Mr. Sherwood,

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which have been addressed to the Court on this point, proceed on the assumption of the interest being pecuniary interest—that such an interest, a pecuniary interest, gives a right to a father to proceed; but no case has been cited; and I understand, that in the Court below, no case was cited, and that the learned Judge of that Court was aware of no case, in which it was laid down what interest would be sufficient to entitle a party to proceed civilly to annul such a marriage. I am unable to find any such case to which I can look in order to ascertain the nature of the interest which will entitle a person to proceed in suits of this description; that is, other than as next of kin, or in remainder, and where it is not of a pecuniary character.

I can easily imagine many cases in which parties may *not* have such an interest as will entitle them to proceed. In the first place, a father has a right to institute a civil proceeding for the purpose of having the marriage of his minor child declared null and void; but a stranger has *no* interest except as one of the public; but as such can only institute a criminal proceeding, which is *ad publicam vindictam*. A stranger, therefore, who wishes to proceed in a civil suit, must show a special interest; and it seems to be admitted, that as a mere stranger, it must be a pecuniary interest.

Let us now consider who are the parties entitled to have a declaratory sentence of nullity of marriage on the ground of the parties being within the prohibited degrees in a civil suit? The first are the parties themselves, either of whom may bring a suit to have his or her own marriage declared null and void. Have they necessarily a pecuniary interest? It may be so: it may be that their pecuniary interest

is affected ; but that is not the principle on which they are admitted to appear in such suits ; for it is on the ground that it is material for their own sakes, and that of the public, that their *status* should be known ; and the object of the proceeding is to have the *status* of the parties to the marriage defined by the sentence of a competent Court, and not on account of any pecuniary interest which they may have. Again ; a father, as guardian of a minor son, may, as has been already observed, institute such proceedings ; not on the ground of any pecuniary, but of a moral interest, which he has in the welfare of his child. So it is not a pecuniary interest which gives a guardian a right to institute a proceeding of this description in respect to his ward ; and many other cases may be stated in which parties are allowed to bring suits of this description for the mere purpose of defining the *status* of the parties, which are not cases in which their pecuniary interests are involved. I have not referred to these instances for the purpose of shewing that the interest of a father in his major child is as strong as in the case of a minor, but only *to shew the principle, which is, not that of having a pecuniary interest*, but that it is important that the parties themselves, and the public, should know what their real *status* is.

The question then comes to this :—is the interest of a father in the marriage of a daughter or of a son, who has attained majority, and especially in the case of a daughter, is the interest of a father in respect to such daughter, who is still an inmate of his house, and a part of his family, sufficient to entitle him to proceed in a cause to have the marriage of such daughter or son declared void ? What are

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the considerations which apply to cases of this description? Does it follow, because the daughter or son has attained majority, that therefore all the obligations which existed between them have ceased? Did they all terminate with minority? Are all the mutual and respective obligations, and duties and rights, of the parties—all the power, control, and authority, of a father over such a son or daughter, at an end the day they attain majority? I think clearly and undoubtedly not. So long as a son or daughter resides under the father's roof, though major, they still make a part of the family; and he, as the head of the family, has the care of the family, and is entitled to exercise a parental control over such persons. I do not conceive that a father is relieved from the obligation of maintaining, supporting, protecting, and advising a daughter so circumstanced: the mutual obligations and duties remain the same—that of protection and advice from the parent, and filial duty and reverence from the child.

This disposes of one class of cases, to which the Court has been referred; for I disclaim for the reasons I have just stated, deciding this case on the ground of *pecuniary interest*, arising from the expectation of the father of succeeding to the property of his child, though I do not say that *that* may not be an ingredient; but I decide the question on higher and moral considerations, arising from the combination of circumstances, constituting the peculiar relation between father and child, which can be found to exist in no other relations of life. Even in the case which was referred to in the argument, to show that the father, *as father*, has no right to bring an action against the seducer of his daughter;

that the father's right is founded on his claim to the services of his daughter, by a fiction of law applicable to the particular case; what is the case? what is the ground of this fiction of law, by which a father is allowed to bring an action to recover damages for the loss of the services of his daughter? That of an *implied* contract between them. I will venture to say that in no other relation of life is there any such *implied* contract; there is no such contract between uncle and niece residing in the same house, or even between brother and sister. Has the uncle or brother a right of action against the seducer of the niece or sister, on account of the loss of their services, though resident in the same house, and under the same roof, on the ground of any *implied* contract? Certainly not. They must both *show an actual and express contract* between them, to entitle an uncle to bring an action for injury done to his niece who is in his service, or a brother to bring an action against the seducer of his sister; the law will not *imply* a contract between them, as between parent and child; therefore distinguishes the relation of parent and child from every other relation whatever.

But I was going to state that a daughter, resident in her father's house, is still subject to his control. It is true, when she has attained majority, she has a right to withdraw herself from his roof and from his protection, to contract marriage without his consent, and to provide for her own maintenance and support. But so long as a child remains under the father's roof, he or she is subject, in a qualified sense, to his control and authority.

In the system of law for the relief of the poor,

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I see a strong analogy to the case before the Court. So long as a son or daughter, notwithstanding he or she may have attained majority, continues to reside in the family, and in the house of the father, the settlement of the father is the settlement of the child. So in the case of a child who is impotent in body, and incapable of gaining a livelihood for himself, the burden of maintaining the child, even after it has attained majority, falls upon the father. This principle was recognised under the statute of Elizabeth, for the relief of the poor; and by the same law a grandfather may be assessed for the relief of his grandchild.

Can it then be said that a father, as such, has no interest in the legitimacy or illegitimacy of the issue of his daughter, whom he may be called upon to support? that he has no interest that the *status* of his daughter should be declared? He cannot resist the claim for the support of his child, if it has any infirmity of mind or body; he cannot resist the claim for maintaining the issue of his child; for the grandfather is bound by the positive law of the country, and still more by the law of nature, to provide for his grandchildren, notwithstanding their majority. It is true the child may emancipate himself and become *sui juris*; still the parent cannot divest himself of the obligation, it being a part of the law of nature that a parent ought to support a child who is unable to support itself. Does not this *imply an interest* sufficient to sustain a suit to ascertain the *status* of the issue of his daughter? Let us see what is said on this subject by the writers on the law of this country. Mr.

Justice Blackstone (a) lays it down in this manner:—"It is a principle of law that there is an obligation in every man to provide for those descended from his loins ; and the manner in which this obligation shall be performed is thus pointed out." And then he refers to the statute 43d Elizabeth, chap. 2, which directs in what manner the poor shall have relief afforded them—"The father and mother, grandfather and grandmother, of poor impotent persons, shall maintain them at their own charges, if of sufficient ability, according as the Quarter Session shall direct." It is true, the learned Commentator goes on to state, that "no person is bound to provide a maintenance for his issue, unless where the children are impotent and unable to work, either through infancy, disease, or accident ; and then is only obliged to find them with necessaries, the penalty or refusal being no more than 20s. a month." It is sufficient for the father to provide necessaries ; for, as he adds, the law did not mean to compel a father to maintain his child in ease and indolence. But this shows that, according to the policy of our laws, founded upon the higher principles of the law of nature, the obligation upon a father of providing for his descendants continues even beyond his own children ; for he may be called upon to maintain the issue of his own children ; and it matters not that with reference to the parties to the present suit, this may be a very remote contingency ; the law is not made for particular cases. In the Berkeley case, (b) Lord Eldon was of opinion, upon the au-

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(a) 1 Black. Comm. ch. 16.

(b) Lord Dursley v. Fitzhardinge, 6 Ves. 251.

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thority of the case of *Smith v. the Attorney General*, cited in the argument, that the smallest possible interest, provided it was vested, would entitle a party to file a bill for perpetuation of *testimony*.

This law, founded upon the law of nature, has received an interpretation from a vast variety of cases. In the case of *The King v. The Inhabitants of the New Forest*, (a) it was held that a child was not emancipated till he gained a settlement for himself, or became the head of a family by marriage; it is expressly laid down that the emancipation is completed when the settlement is completed. Lord Kenyon said, "the son was not separated from his father; he had gained no settlement for himself; the son, indeed, did on the same day enter into a contract, which, when completed, would confer a settlement on the son." And in the case of *The King v. Sowerby*, (b) it is laid down that it is not sufficient that a son should be of age, and have an independent business of his own; if he remains under his parent's roof, he thereby makes his election to remain a member of his father's family, and is not emancipated. And many other cases are to be found in the different Books of Reports, all going to the same point, namely, that a child does not become completely emancipated from parental control, unless he shall have contracted some relation incompatible with that control, so long as he remains in his father's house, and continues to be a part of his family. There is one case in which I find this laid down in

(a) 5 T. R. 478.

(b) 2 East, 276

strong terms, the case of *The King v. The Inhabitants of Roach* :” (c) Lord Kenyon there commenting upon what was supposed to have fallen from him in *The King v. Witton-cum-Twambrookes*, is reported to have expressed himself in this manner : “ I think I could not have said because it “ never was my opinion, that the mere circum- “ stance of a son’s attaining the age of twenty-one “ was an emancipation, so as to prevent his having “ a derivative settlement gained by his father after- “ wards, if the son continued to live with the “ father; for, if the son, with unbroken continu- “ ance remain with, and a member of, the father’s “ family, he is not emancipated.” And in the same case Mr. Justice Ashurst said, “ In some cases, per- “ haps, it may be difficult to say what shall amount “ to a severance from a father’s family. When “ a child becomes of age, it is optional in him “ either to continue with his parents or not, as he “ pleases.”—So it was optional with Miss Ray to have continued with her parents or not after she attained majority.—“ He is then *sui juris*. But if he leave “ his father’s house, and put himself under some “ other control, this is a kind of public notification, “ that he means to leave his father’s family ; and if “ afterwards the father acquire a new settlement, “ it cannot be communicated to the son, because “ he has ceased to be part of his father’s family.” And it is for the purpose of showing that a child, *after majority*, continuing a part of the father’s family, is still subject in some degree to parental control, that the Court has adverted to the case. Mr. Justice Lawrence also observed in the same

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case, "The daughter, being of age, put herself out
 "of her father's control, and therefore ceased to
 "be part of his family." These cases, and many
 others to the same effect, might be stated, (a)
 which make the matter quite clear, and the Court
 can entertain no doubt upon this point.

These, then, are the grounds upon which I am
 disposed to decide this case, and not upon the
 narrow ground, that the father has an interest of
 a pecuniary nature—the expectation of succeeding
 to his daughter's property if she should die a
 spinster and intestate—though that, I think, may
 be an ingredient in the case. In the case of
 Watson and Faremouth, the learned Judge seemed
 to incline to the opinion that the interest of a
 next of kin would be sufficient. It was not ne-
 cessary in that case to decide the point—and he
 did not decide it; but it shows that he did not
 think it a monstrous proposition that the interest
 of a next of kin should be deemed sufficient to
 maintain a suit of this description. But again I
 expressly say, I do not decide this question on that
 ground, but on the higher principles of the law of
 nature. My decision is grounded upon a combina-
 tion of the various obligations, duties, rights, and
 interests, which distinguish the relation between
 parent and child from that which exists between
 any other individuals whatever; so that there can
 be no fear of any inconvenient extension of this
 principle to other parties, as was suggested in
 argument.

(a) The King v. Everton, 1 East, 526. The King v. Bleasby, 3 B. & Ald. 377. The King v. Wilmington, 5 B. & Ald. 525. The King v. Lawford, 8 B. & C. 271.

I am of opinion that the interest of Mr. Ray in the legitimacy or illegitimacy of the issue of his daughter is sufficient to entitle him in these Courts to maintain a suit for annulling her marriage, resting my opinion upon the authorities I have referred to, and upon the principles on which those authorities are founded. It is a misfortune to me that I should differ from the learned Judge in this respect, but I am bound to state the conviction of my own mind. I am of opinion that the libel is proper to be admitted—not, indeed, in the form in which it now stands; the words “*although neither of them, the said Thomas Moulden Sherwood or Emma Sarah Ray, had ever resided in the said parish of St. Mary Whitechapel,*” in the 10th Article, must be struck out; because I am prohibited by the Marriage Act from inquiring into the fact whether the parties were resident in the parish where the banns were published.

The Judge then pronounced for the Appeal, reversed the sentence appealed from, and retained the principal cause; and, after striking out the words “*although neither of them, the said Thomas Moulden Sherwood and Emma Sarah Ray, had ever resided in the said parish of Saint Mary, Whitechapel,*” in the 10th Article, admitted the libel.

From this decree an appeal was interposed on behalf of Mr. Sherwood to his Majesty in Council.

Confirmed, Moore. PC. 396.

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PREROGATIVE COURT OF CANTERBURY.

HAYLE *against* HASTED AND PIERSON.*On Petition.*

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HILARY TERM,
Jan. 29th.
3rd Session.

JUDGMENT.

SIR HERBERT JENNER,

A sentence in favor of a draft will pronounced in a suit against the executors of a former will, is binding on the legatees named therein; unless fraud or collusion can be shewn between the parties to the suit, or neglect or mismanagement in the conduct of it.

IN this case Fanny Newson, the deceased, died a spinster, on the 14th December, 1833, at the advanced age of eighty-five years, leaving two sisters, Elizabeth Hinton Widow, and Martha Smith, also far advanced in years, and possessed of property to the amount of 25,000*l*.

On the 26th of March, 1832, she executed a will, in the presence of two witnesses. At this time, Mary Newson, another sister, was living, but she died in August, 1833. The deceased also executed a codicil to her will, on the 1st November, 1833. By the will she gave all her three-and-half per cent. stock to her executors, in trust for her sister, Mary Newson, for life, and after her decease, in equal moieties to her sister, Mrs. Hinton, and her daughter, Mrs. Hayle, independent of her husband, for their joint lives, and on the death of either of them, the survivor was to have the whole for her life; on the death of the survivor, the principal was to go to Mr. James Newson.

She also gave 100*l.*, three per cents., to Mrs. Smith ; 500*l.* three per cents. to Mrs. Hinton, and a like sum to Mrs. Hayle ; and 100*l.* three per cents. to each of her executors. She then gave the residue of her property to her sister, Mrs. Hinton, and Mrs. Hayle during their joint lives, and the life of the survivor, and at the decease of the survivor, the principal to be equally divided between Mary, the wife of Captain Edwin Bloomfield, Caroline Newson, and Ann Newson ; and she appointed the Rev. Mr. Hasted, of Bury St. Edmunds, and Mr. Jaspar Pierson, of Framlingham, executors and trustees. The codicil, which is without date, but which appears to have been executed on the 1st November, 1833, and attested by Mr. Sergeant Taddy, bequeaths to the Rev. John Smith of Dilhorn, 500*l.* three per cents., and to the Rev. John Taddy, of Northill, Bedfordshire, 500*l.* three per cents., in addition to his legacy of 100*l.* in the will ; this codicil being written on the same sheet of paper as the will.

Shortly after the death of the deceased, the executors were sworn to the execution of the will and codicil, but in consequence of the will containing a direction that “ in case the deceased should leave “ any paper in her handwriting with gifts or directions of any sort, they were to be considered as “ part of her will ;” it became necessary to make a search amongst her papers, to ascertain whether there were any such in existence ; and the result was, that several papers of a testamentary character written upon scraps of paper, some signed, and some unsigned, were discovered. The advice of counsel was then resorted to, and the executors, were advised that they could not act with safety to

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themselves without the Judgment of the proper Court, as to the papers which were entitled to probate; and, as in the course of the communications with counsel; a draft of a new will, of a subsequent date to the codicil prepared for the deceased, was produced, the parties were further advised, that the whole of the circumstances should be communicated to Mr. Newson, the residuary legatee, that he might take advice as to the propriety of propounding that paper; he being entitled under it to a considerably larger interest, than under the will of March, 1832.

In pursuance of the advice he received, Mr. Newson propounded the draft will, which would, in effect, if established, revoke the former will and codicil, and reduce very materially the benefit to Mrs. Hinton and Mrs. Hayle. Mr. Hasted and Mr. Pierson were executors in both papers, and they were made parties in the cause then instituted, and as such, opposed the draft will, and prayed probate of the will of the 6th March, 1832, and of the codicil of the 1st November, 1833: thus in effect, representing and protecting the interests of all the parties benefitted under those instruments respectively.

Affidavits as to scripts were brought in on both sides, and annexed to them were the various scraps of paper which had been found, together with the will of March, 1832, the codicil of November, 1833, and the draft will; so that the Court had all the papers before it.

On the 28th April, 1834, a proctor appeared for Mr. Newson, the residuary legatee in the draft will, and another proctor for Mr. Hasted and Mr. Pierson, the executors in the will of October, 1832.

On the first session of Trinity Term, 27th May, 1834, the affidavits as to scripts were brought in; the draft will was opposed and propounded, the allegation propounding it being brought in on the second session, the 4th June, 1834.

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On the third session, the 14th June, the allegation was admitted, after opposition, and two witnesses were produced. On the fourth session, 24th June, publication—the witnesses produced being first examined—was prayed, and the cause was assigned for sentence on the second assignation on the bye-day. On the 10th July, the case came on for hearing, when it was argued by counsel on both sides, and the Judge pronounced for the validity of the draft will propounded, as the last will of the deceased, and probate was accordingly taken by Mr. Hasted and Mr. Pierson the executors.

These were the steps taken after the death of the deceased, and it does not appear to me that any undue haste or precipitation has been used, for the deceased having died on the 14th December, 1833, probate is not taken till the 10th July, 1834, and the progress of the cause through its different stages occupied from the 27th April to that period, which, considering that there was only one short allegation, on which not more than three witnesses were examined, was ample space for the purpose.

Probate having been taken by the executors they proceeded to act under it, the legacies were paid, and the effects administered; but in April 1835, an application was made to the Court for a decree, calling upon the executors “to bring in the probate “and to show cause why it should not be revoked “and pronounced null and void, as having been

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“obtained by fraud and collusion between the pretended executors, or one of them, and the pretended residuary legatee, to the prejudice, and without the knowledge, of the said Elizabeth Hinton, and Fanny Hayle ;” the words which the Court has just used, are those of the affidavit on which the motion for the decree was founded, and which affidavit is dated the 15th April, 1836.

Fraud and collusion being alleged, the Court, as it was bound to do, directed the decree to issue, calling upon the executors, not in the first instance to bring in the probate, but to show cause why it should not be revoked, as having been fraudulently, and under false pretences, obtained.

An appearance was given for the executors, and an act on petition has been entered into, containing the grounds upon which the several parties rest their case, and affidavits have been exhibited on both sides : Mrs. Hinton having died in February, 1835, Mrs. Hayle is the only party before the Court, praying the revocation of the probate.

This paper having been regularly propounded, and witnesses examined in support of it, and a sentence pronouncing for its validity recorded ; the executors of the former will having been parties to the suit ; it seems to be admitted that according to the practice of this Court, it is not competent either to the parties to that suit, or to those whose interests may have been affected by it, to call in the probate of it, and to require that it should be repropounded, unless it can be shown that there has been fraud or collusion practised to their prejudice, or that there has been neglect or mismanagement in the conduct of the suit : and this upon the principle, that the executors in the former will represent, and

are the protectors of the legatees under it, being specially entrusted by the deceased with the care and management of her property, and to see her intentions carried into effect; and who must be presumed to have performed their duty with fidelity until the contrary is proved. Cases (a) have been cited, in which this doctrine has been adopted and acted upon by this Court, but to which it is hardly necessary to advert in detail, since, as a general proposition, the principle does not seem to be disputed; though it was said that it is not universally true in its full extent; and that the present case was distinguished from any that had preceded it, inasmuch as the same executors were appointed by both wills, and therefore had the same interest under each; so that it was immaterial to them which was pronounced for; but this does not in my opinion form any real ground of distinction, for the executors were bound to the best of their ability to defend the interests of the legatees under the first will, of which they stood before the Court praying probate, and which they must be taken to have considered as containing the last will of their testator, and which as such it was their duty to see carried into effect; for it is not the interest of the executors, but the intention of the testator which is to be attended to.

Upon the ground, therefore, that the executors have the same interest under both wills, I do not think that the case is distinguished from those which have been adverted to in argument; and the parties praying the revocation of the probate al-

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(a) *Colvin v. Fraser*, 2 Hagg. 292; *Medley v. Wood*, 1 Hagg. 645; *Newell v. Weeks*, 2 Phill. 224.

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ready granted, must show some other ground to induce the Court to comply with the prayer of their petition.

Now there are two other grounds upon which this petition rests :

First, Fraud and collusion between the residuary legatee and the executors in the first will.

Secondly, Fraudulent concealment of the existence and of the purport of the draft will, and of the suit that was pending with respect to it, from the parties materially interested in it, to their prejudice.

If either of these grounds is established, it is admitted, as indeed it could not have been denied, that the principle before mentioned, that the executors bind the legatees, fails, and that the Court is bound to give the parties the opportunity of bringing forward their case.

The facts stated in the affidavits have been brought to the notice of the Court with great particularity, and have been fully discussed. The Court has also read them through with great attention, but it does not seem necessary to advert to them again with much minuteness of detail, for the general circumstances are pretty much the same in both sets of affidavits, and many of the facts as to which they differ, are not, in the view of the Court, material to the decision of the case.

The parties directly charged with the fraud, are Mr. Pierson, one of the executors, and Mr. Newson, the residuary legatee ; Mr. Hasted, the other executor, is not implicated in the charge, it being expressly stated in the first affidavit of Mrs. Hayle, that “ she has no reason to know, or to believe, that “ the aforesaid Rev. H. Hasted was either party or

“ privy to any such fraud or collusion :” and yet it is rather singular, that of the two executors, he has taken the most active part in the executorship affairs, in consequence of his residing nearer to the spot where they were to be transacted—but it would indeed seem difficult to conceive why he should have been a party to a fraud, not having apparently at least, any interest one way or the other.

It would have been equally difficult to assign any reason for Mr. Pierson having lent himself to the fraud, as he also has as little interest as his co-executor Mr. Hasted, were it not that he is the brother-in-law of Mr. Newson, and may therefore be presumed, as was suggested, to have had an inclination to support the interest of the latter.

But though Mr. Pierson and Mr. Newson are the only persons expressly charged with fraud and collusion, there are pretty strong averments tending to implicate Mr. Dalton, the drawer of both wills, and who seems also to have been the confidential solicitor of the deceased and her family, or at least of some parts of it, and, as far as appears, to be generally at least of a respectable character, and to have had no reason to espouse the cause of Mr. Newson in preference to that of Mrs. Hinton and Mrs. Hayle, except, as he has been described, as the joint solicitor of Mr. Newson and Mr. Pierson ; but, be that as it may, it is from their conduct and acts that the parties are to be judged. What then are the facts upon which reliance is placed, to establish this charge of fraud ? That immediately after the death of the deceased, a communication was made to Mrs. Hinton and Mrs. Hayle of the benefit which they were to derive under the

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will of March, 1832. The letter conveying the information is from Mr. Pierson, and is dated 21st December, 1833, a week after the death of the deceased; it is not necessary to read the contents of the letter, inasmuch as it is too clear to admit of a doubt that at this time, and indeed until long after, the writer was not aware that there were any other papers of a testamentary character in existence.

Mr. Dalton had indeed shown the draft of the will to Mr. Hasted, about the 20th December, but it is expressly sworn that Mr. Pierson knew nothing of it, until after the 12th March, 1834, when he was furnished with a copy of counsel's opinion, dated on that day.

Mr. Dalton also wrote a letter on the 26th December, 1833, giving similar information to Mrs. Hinton, and which is set out in the affidavit of Mrs. Hayle.

But neither Mr. Dalton nor Mr. Hasted, at this time had an idea that the draft will could have any effect whatever; or the executors would hardly have been sworn to the execution of the will of March, 1832, and of the codicil of November, 1833; whatever letters therefore actually passed between the parties at this time, could not have had reference to any other will than that just mentioned, and the Court may therefore lay out of its consideration every thing that passed between the death of the deceased, and the 12th March, 1834, as there could not in that interval of time have been any reason whatever for concealment of any kind from Mrs. Hinton or Mrs. Hayle: all were acting under the same impression, that the will of March, 1832, and its codicil, were the only subsisting ope-

rative instruments ; unless indeed some of the testamentary scraps of paper might possibly be considered as entitled to proof.

The case however may be different after the 12th March, when it became known that the draft will was to be propounded; then the interests of Mrs. Hinton and her daughter Mrs. Hayle were placed in a situation of some jeopardy, and Mr. Newson, the residuary legatee, had an interest to maintain, adverse to that of those ladies; he had therefore a motive for fraud : but that is not sufficient, it must be proved that he acted upon that motive, and sought to obtain his object by fraudulent means : nay, I think the parties must go further, and show, that not only Mr. Newson had recourse to fraud, but that the executors also were parties to it; as it was to them that Mrs. Hinton and Mrs. Hayle were to look for protection and information, and not to the party setting up an interest adverse to them.

But in what does the alleged fraud consist? why it is said in the affidavit of Mrs. Hayle, that Mr. Newson visited Mrs. Hinton some time in the month of March, 1834, and requested her to permit him to see all the letters which she had received from Mr. Dalton or Mr. Pierson, on the subject of, as also any other papers she had in her possession relating to, the will of her late sister; suggesting to her, that the same were wanted, in order to the proving of the will of her said sister, which he stated had not then been proved; and that accordingly Mrs. Hinton delivered up to him all the letters she had received from Mr. Dalton or Mr. Pierson, and several other papers (with the exception of the two letters of the 21st and 26th December, 1833), and which papers Mrs. Hayle believes are now in the hands, possession, or control of Mr. Newson.

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Now supposing this account to be true, it seems somewhat difficult to conjecture what purpose of fraud was to be answered by withdrawing these papers from observation ; neither the contents nor the dates of the letters are stated, but it is said they were of a similar character to those set forth in the affidavit, only containing more minute information, that is, referring more particularly to the interest which Mrs. Hinton and Mrs. Hayle took under the will of 1832, which, for the reason already mentioned must necessarily have been the case : but there does not seem to be any reason why they should be withheld, if indeed any such letters were written ; but the fact is denied : Mr. Newson swears that he neither in the month of March, 1834, nor at any other time, asked Mrs. Hinton to allow him to see all or any of the letters at any time received from Mr. Dalton or Mr. Pierson on the subject, or that he at any time received any such letters or any other papers from Mrs. Hinton, save those afterwards mentioned in the affidavit, and which are not those stated in Mrs. Hayle's affidavit ; he also denies having suggested that they were wanted, in order to the proving of the will of Mrs. Newson.

It is true, as has been said, that the affidavit of Mr. Newson is only affidavit against affidavit, of parties equally interested in opposition to each other ; but Mr. Newson is corroborated by the affidavits of Mr. Dalton and Mr. Pierson. Mr. Dalton deposes that to the best of his belief the only letters he wrote to Mrs. Hinton, besides that set forth in the affidavit of Mrs. Hayle, were one dated the 27th December, 1833, enclosing discharges for legacies under the will of Mary Newson, and another of January, 1834, annexed to the affidavit of Mr. Newson, inquiring the ages

of Mrs. Hinton and Mrs. Hayle, for the purpose of ascertaining the duties payable on their life interests under the will of Mrs. Fanny Newson; this letter, with the answer annexed, is exhibited.

Mr. Pierson swears that he verily believes that the only letter which he wrote to Mrs. Hinton respecting the affairs of the deceased, was that set forth in the affidavit of Mrs. Hayle, and dated 21st December, 1833. So that against the single affidavit of Mrs. Hayle, there is the positive denial of Mr. Newson, and the affidavits of Mr. Dalton and Mr. Pierson, deposing to facts tending to show that the charge is unfounded, and could not be true, and the Court is unable to discover any room for mental reservation in the affidavits either of Mr. Dalton or Mr. Pierson as was suggested in argument: this seems to be the only tangible act of fraud charged against the parties, and has, I think, been satisfactorily refuted.

The other charges seem to resolve themselves into acts rather of omission than of commission; the fraudulent concealment of the existence of the draft will, or the effect it would or might have on the interest of Mrs. Hinton and Mrs. Hayle, as well as of the steps which were taken in order to have the question determined as to which of the papers were to be proved as the will of the deceased; and here the Court may observe, that it is not able to collect from these affidavits that Mrs. Hinton or Mrs. Hayle were expressly informed of all these particulars, though they were acquainted generally with the difficulty which existed in proving the will of the deceased, and it would certainly have been more satisfactory if a more precise communication of the situation in which they were placed had been

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made to them ; but still the absence of such communication does not infer necessarily any intention of fraud, or necessarily lead to any prejudice to the interest of the parties.

Mrs. Hayle also in her affidavit swears that in the month of September, 1834, she received a communication as to her interest under the deceased's will, differing materially from the information previously communicated to her ; that feeling astonished at such communication, she and her mother, Mrs. Hinton, at the earliest period that they were enabled to do so, under the circumstances stated, caused inquiries to be made at Doctors' Commons, in the final result of which, " to wit, about the middle of January, 1835, her " mother and herself for the first time became " aware that certain pretended instructions given " by the deceased, as pretended to Mr. Dalton for " her last will, had been propounded as her will by " Mr. Newson the residuary legatee, and that a " sentence in favor of the validity of such instruc- " tions pronounced upon, in effect, the sole evi- " dence of Mr. Dalton, acting in concert with, and " as the agent or solicitor of Mr. Pierson and Mr. " Newson, in procuring a sentence in favor of the " draft will ;" and further swearing " that neither " she, nor, as she believes, Mrs. Hinton, either knew " of or suspected even the existence of the said pre- " tended instructions, much less had any know- " ledge or suspicion that the same had been pro- " pounded as the will of the deceased, or that " there was any intention of the executors, or of " Mr. Newson to dispute the will of 1832 ; and " that the existence of the instructions and of the " other matters, facts, and circumstances, were

“ purposely and wilfully concealed and kept from
 “ their knowledge in the fear, and under the appre-
 “ hension that they, or some person on their
 “ behalf would have effectually resisted the pro-
 “ bate obtained as aforesaid of the pretended in-
 “ structions.”

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Here then is a direct charge of a wilful concealment for fraudulent purposes, not only of the pending suit, but even of the existence of the draft will; and a positive averment that neither Mrs. Hayle nor Mrs. Hinton had any knowledge of the existence of the draft will (or, as Mrs. Hayle calls them, instructions), till the month of January, 1835; it being now admitted, that a copy of the will, as proved, was delivered to them, certainly not later than the 4th October; possibly before: and that so early as the 5th of that month, the next following day, suspecting some fraud to have been practised upon them, they consulted Mr. Debney, and through him Mr. Crabtree, and Mr. Tumley, as to the best means of investigating the transaction, and this under the impression, as Mrs. Hayle swears, that they had been unfairly dealt with.

This, not to say more, is at the best, a very incautious mode of swearing, and ought to have been particularly avoided, when the object was to fix the imputation of most grossly fraudulent conduct on other parties, and undoubtedly would render the Court very careful in receiving the evidence of an individual who had shown herself so careless in a matter of so much importance, in preference to Mr. Dalton, Mr. Pierson, and Mr. Newson on the subject of the withdrawal of the letters from Mrs. Hinton, or indeed on any other subject when opposed to

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evidence of a different tendency ; and when it is said that this is, morally speaking, to be taken as the joint affidavit of Mrs. Hinton and Mrs. Hayle,—Mr. Tumley swearing that he received the instructions for preparing it from both jointly, and that he verily believes the same would have been sworn to by Mrs. Hinton and Mrs. Hayle, but for an accident which the former met with, and which terminated in her death—the Court will only observe, that it hopes that Mr. Tumley has taken up an erroneous impression upon that point, and that if the attention of Mrs. Hinton had been called to the particular fact stated, she would have paused before she lent the sanction of her oath to a statement now admitted to be inaccurate ; she however did not swear to it, and Mrs. Hayle is alone answerable for the contents of the affidavit.

But, notwithstanding all this, the Court would not preclude the party from any benefit which it thought she might derive from having this paper re-propounded, if there were any reason to suppose that there had been any fraudulent concealment practised, or even if there were any suggestion now made that if she had been aware of the real nature of the question, as affecting her interest, she was in possession of facts which would have led to a different conclusion to that at which the Court had arrived ; or that there had been a suppression of any important facts by the executors of Mr. Dalton.

But the Court has looked in vain through these affidavits, for any such averments ; the particular nature of the facts the Court would not probably require to be stated, but it might reasonably expect that some general averment of suppression or

perversion of facts should be made on oath, as laying the foundation for the present application; and that the party should not have contented herself with a mere general allegation.

The Court purposely abstains from going into that part of the case which consists of circumstances which arose after the probate of the draft will had been obtained; from entering into the discussion whether Mr. Cavill was employed by Mr. Pierson, without the direction of Mrs. Hinton; whether Mr. Crabtree was the family solicitor of Mrs. Hinton; whether Mrs. Hayle disavowed the application made by Mr. Debney for 80*l.* or 100*l.* in the latter end of October, 1834: or whether the alleged attempts of Mr. Newson to endeavour to prevail upon Mrs. Hayle to repudiate the notice of the motion for a decree calling in the probate, and of the alleged adoption and acquiescence of Mrs. Hayle in the will, by her acts, after she became informed of the probate having been obtained, and after her suspicions and those of her mother had been excited. All these circumstances are outlying, and at a distance from the main question, and can only bear very remotely, if at all, upon it, the Court therefore lays no stress whatever upon them: the real question is, whether fraud has been practised; or if that should not be made out, whether the interests of Mrs. Hayle and Mrs. Hinton have been prejudiced by the course in which the cause was conducted; for one or other of these propositions must be established to the satisfaction of the Court before it will recall what has been done, and revoke the probate already granted after the will had been regularly propounded and proved by witnesses: it will not take

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such a step upon the bare speculation that a different result may possibly (not probably) be produced.

With respect to the first of these propositions, I am clearly of opinion that there is no ground whatever for imputing fraud to any of these parties in not stating more particularly to Mrs. Hinton and Mrs. Hayle the nature of the difficulties which prevented the probate of the deceased's will passing; and upon the other point, I am also of opinion that there is no reason to apprehend from all that is stated in these proceedings, that any thing has been kept from the knowledge of the Court, or of the parties which would have had the effect of altering the sentence already pronounced: had such appeared, whether the concealment were wilful or accidental, the Court would have had no difficulty in putting the party in such a situation as would enable her to avail herself of their full effect; but as it is, I feel myself bound to reject the petition.

I shall give no costs: the interest of the parties was much reduced, and they were probably ignorant of the precise question to be investigated; although I entirely disapprove of the unfounded imputation of fraud which has been brought forward in this case.

CONSISTORY COURT OF LONDON.

THE OFFICE OF THE JUDGE PROMOTED BY WALTER
against MOUNTAGUE AND LAMPRELL.

On the admission of an Allegation.

THIS was a criminal proceeding instituted by the Rev. Edward Newton Walter, the rector, against David Mountague and Edmund Lamprell, the churchwardens of the parish of Leigh, in Essex. On the 27th of August, 1835, a citation was extracted, calling upon the churchwardens to answer to certain articles, &c, and on a subsequent day articles were admitted to the following effect.

1. We article, &c., that you David Mountague and Edmund Lamprell were and are the churchwardens for the said parish of Leigh, in the county of Essex, and were elected and sworn into that office for the year 1834 and 1835.

2. That there hath from time immemorial been a foot-path through the church-yard of the said parish of Leigh, from the rectory or parsonage house of the said parish to the road or highway leading to the town of Prittlewell; and further, that in the month of March last past, you the said David Mountague and Edmund Lamprell, without the consent and contrary to the remonstrances of the said Rev. Edward Newton Walter, clerk, the rector of the said parish of Leigh, and without any lawful authority whatever in that behalf, made or caused to be made a new foot-path across a part of the church-yard of the said parish leading out of

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the said old foot-path into the high-road; and took down, or caused to be taken down, a part of the fence or boundary of the said church-yard, and erected or caused to be erected a gate or gates therein, leading into the said church-yard out of the said high road, and thereby made or caused to be made a new entrance into the said church-yard. And moreover, that in and by so doing; you the said David Mountague and Edmund Lamprell cut and dug up, or caused to be cut and dug up, a portion of the turf and ground or soil of the said church-yard, over the bodies or corpses of divers there buried, and of some of whom the families or relations were and are still resident in the said parish of Leigh, and who have been aggrieved thereby, and have complained thereof, &c.

3. Also, that repeated applications have been made to you by the said Rev. Edward Newton Walter, the rector, and by several of the parishioners of the said parish of Leigh concerning the premises in the months of April and May last, or one of them, notwithstanding which you did and still do persist in maintaining the said new foot-path, and causing the same to be used as a public footpath, thereby desecrating so much and such part of the said church yard, &c.

An allegation was now offered to the Court on behalf of the churchwardens by way of defence, pleading in substance as follows. :—

1st. That the map or plan hereto annexed is a correct map or plan of the church-yard, and of the several entrances into and paths within, and of the roads and ways leading to and about the same, and the map was annexed.

2d. That until between seven or eight years from the present period, there were three entrances into the said church-yard of Leigh, with the paths leading therefrom; the said entrances being in the map or plan marked by the figures 1, 2, and 5, and the paths being as described: that at the entrances marked 1 and 5 there were gates opening upon the paths leading therefrom, and also swing gates at the sides thereof; and that at the entrance marked 2, there were steps, or a stile, through or over the fence of the church-yard; that until the said steps or stile and the swing gates were removed, as hereinafter pleaded, the paths leading from the three aforesaid entrances were used as public paths, and there were thoroughfares by means thereof through the said church-yard, &c.

3d. That about seven or eight years ago some inconvenience having been experienced from the use of the said paths as common thoroughfares, attempts were made, by or under the direction of the Rev. Edward Newton Walter to close the said paths as common thoroughfares; that such attempts were ineffectually resisted by the parishioners of the parish of Leigh, and the aforesaid steps and swing gates were, *but without any lawful authority*, removed, and from such time there remained but two entrances into the said church-yard, and which entrances were only opened on the days on which the service of the church was performed, or parish meetings held, &c.

4th. That in or about January, 1835, that part of the high road leading by and close to the church-yard of Leigh, marked in the map by the figure 8, was by the orders of the trustees of the high road considerably lowered, and close to the entrance

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No. 1, to the extent of two feet, nine inches, or thereabouts, whereby the said entrance was rendered useless, and there remained but one available entrance into the church-yard, by reason whereof the parishioners of the said parish suffered great inconvenience. That no attempt was made by the said Rev. Edward Newton Walter to remedy the same, nor did he make any application to the said David Mountague and Edmund Lamprell, or either of them for that purpose, until after that they had, under the directions and with the concurrence of the said parishioners, caused gates to be erected at the entrance to the church-yard, No. 2. That until the said gates were erected, the said Rev. Edward Newton Walter did not directly or indirectly forbid, or in any manner object to the erection thereof.

5th. That the re-opening of the said entrance No. 2, and erecting gates thereat, is a great convenience to the parishioners of the said parish of Leigh, and that the expenses thereof have been allowed in the accounts of the churchwardens, passed at a meeting duly holden in the vestry room of the said church.

6th. That since the erection of the gates at No. 2, the said gates and paths leading therefrom, and the other entrances into, and paths within the said church-yard of Leigh, have been visited and inspected by the Rev. Sir John Head, the rural dean of the deanery of Rochford, within the precincts of which the parish of Leigh is situated, and that he had approved thereof, and communicated such his approbation to the said Rev. Edward Newton Walter.

7th. That amongst other things it is untruly pleaded in the second of the articles exhibited against

the said David Mountague and Edmund Lamprell, and admitted in this cause, "that without the consent and contrary to the remonstrances of the said Rev. Edward Newton Walter, and without any lawful authority they made or caused to be made a new foot-path across the church-yard of the said parish, and made or caused to be made a new entrance into the same;" and that it is untruly pleaded in the third of the said articles "that they have by maintaining a new foot-path, and causing the same to be used, desecrated a part of the said church-yard," for that after the erection of the aforesaid gates at No. 2, James Butler, otherwise Thorowgood, a witness examined on the said articles, was employed to restore the old path leading from the said entrance; that having removed a small portion of the grass or turf thereon, he was directed by John Wade, a parishioner of the said parish, to go to the said Rev. Edward Newton Walter, and receive his directions before he proceeded any farther: that accordingly he the said James Butler, otherwise Thorowgood, went to the said Rev. Edward Newton Walter, who forbade him to restore the said old path, whereupon the grass or turf which had been removed as aforesaid was immediately replaced, that since such time no turf or grass has been cut or removed from the said path, nor anything whatever done towards restoring the same, &c.

8th. That at the time of the erection of the gates at No. 2, there were marks and signs of the old path leading into the church yard from such approach, and such old path and no other has been used as the path leading from the said entrance since the erection of the said gates, and that the said Rev. Edward Newton Walter has been upwards

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of twenty years rector of the said parish of Leigh, and at the time he instituted the present proceedings well knew the said old path, and that the same and no other had been used from the said entrance.

9th. That the said Rev. Edward Newton Walter is now, and has been for many years negligent of and inattentive to his parochial duties, that he has very rarely attended parochial meetings, but has left the business of the parish to be transacted and managed by the churchwardens thereof without any interference on his part; that shortly previous to the election of churchwardens for the said parish in the year 1833, the said Rev. Edward Newton Walter made application to the aforesaid David Mountague to be his (Walter's) churchwarden, but that the said David Mountague then declined the same; that in the following year, previous to the election of churchwardens, the said Rev. Edward Newton Walter repeated such his application to the said David Mountague, who thereupon consented, upon the express understanding and positive promise given by the said Rev. Edward Newton Walter that he would attend and preside at the parochial meetings, so that he the said David Mountague should have his sanction and countenance for the acts done at the said meetings—that such understanding was well known to the parishioners—that he for some time attended, but afterwards neglected, and that the whole business devolved upon the said churchwardens.

10th. That the said Rev. Edward Newton Walter is not now and has not been for some time past in the receipt of the tithes of the said parish, but that the same are mortgaged, or assigned and received

by some other person, and that the parishioners have received notice not to pay tithe to him, and that the said Rev. Edward Newton Walter is, and is well known to be, in pecuniary difficulties and bad credit.

11th. That John Gillson, a witness, examined in support of the Articles, is well known at Leigh and its neighbourhood to be a person of slight credit, and whose bond would not be received as good security for one hundred pounds—that such reputation of the said Gillson is well known to the Rev. Edward Newton Walter, that notwithstanding, he procured the said Gillson to become his surety, and to join in the bond given previously to the commencement of these proceedings.

12th. Annexed the bond, and pleaded the identity of Gillson.

This allegation was opposed by *Addams* and *Nicholl*.

Phillimore and *Haggard* argued in support of it.

JUDGMENT,

DR. LUSHINGTON.

Before I pronounce my opinion upon the admissibility of this allegation, it is indispensably necessary that I should consider what is the substance of the Articles which have been admitted.

Now the substance of the Articles is this. The Court here read the Articles, and proceeded—I may observe that the important points are—first, the making a new foot path, and secondly, erecting a gate where there was not one before.

The allegation before the Court sets forth a variety of facts in reply, and I have been told that,

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Articles having been admitted against churchwardens for making a new footpath across a church-yard, &c.

An allegation in reply, pleading facts shewing that the churchwardens acted *bonâ fide* and for the benefit of the parishioners, rejected, as not setting up a legal defence.

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if the churchwardens have acted *bonâ fide*, I ought not to interfere; but supposing it to be true that they have acted with good intentions, and for the benefit of the parishioners, still it is my duty to look to the legal justification.

First, then as to the churchyard; it is clear that by the common law the rector has the freehold therein, qualified undoubtedly by the rights of the parishioners, but subject thereto he may bring an action for trespass if his right be unjustly invaded. The churchwardens by virtue of their office are bound to see that the foot paths are kept in proper order and the fences in repair.

Individuals may by prescription have a right of way; and parishioners have the same right for the purpose of attending Divine worship, vestries, and other fit occasions. The public may also have a right of way which is not to be infringed upon.

I apprehend that neither the rector nor the churchwardens can make a new path without a faculty from this Court. In strictness that is by law required.

I think the consent of the rector is necessary by reason of his common law right; but I do not say whether or not, if the rector be called upon to show cause, and he obstinately opposes a faculty, the Court may grant it. That point I consider it is not necessary to decide. The case of *Seager v. Bowle* (a) merely went to this, that you cannot legally erect a monument without a faculty. The case of *Tattersall v. Knight*, (b) approaches much nearer the case before the Court—there a faculty was decreed.

(a) 1 Add. 541.

(b) 1 Phill. 232.

notwithstanding the opposition of the vicar—but that was for the erection of a gallery *inside* the church. As to varying the path there is no difficulty, for the statute 59 Geo. 3, c. 134, empowers the church commissioners in that respect.

With regard to the jurisdiction, the churchyard being consecrated ground, this Court has cognizance of the matter, and it is my duty to protect it against any unauthorized or illegal invasion whatever; and supposing the alterations were most convenient, still the court would not sanction them, unless the consent of the rector had been previously given, or at least asked.

If this is an ancient foot path, it is competent to any individual to proceed at law; and if the question were raised here, this Court might be stopped by prohibition.

How stands the case then in the present allegation? The allegation begins by annexing a plan, and it pleads that seven or eight years ago there were three entrances into the churchyard; that at Nos. 1 and 5 in the plan there were gates, and at No. 2, there were steps, or a stile; it is intended to plead that formerly there were common thoroughfares through each entrance, but that lately the gates were opened only on a Sunday; it comes to this, that seven or eight years ago the rector illegally stopped up these ways; if so, any parishioner might have resisted, might have brought an action at law, or in this Court might have called on the rector to restore the paths. Can I in this suit receive *this* as an answer? If the churchwardens had not the power to open these gates, can it be said by way of defence, that some time before, the rector did an illegal act; and it is to be observed, that

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there is no averment that from *time immemorial* these paths existed. I cannot therefore admit the first, second and third Articles as a defence. The fourth pleads (the Court here read the fourth Article) the short substance is this, that inconvenience arising from stopping one entrance, the churchwardens make another. Now it was competent to them to remedy the defect occasioned by the legal act of the highway trustees, and then, if the rector opposed them, they might have proceeded against him here; but the fact is, that without any authority from the rector, the churchwardens make a new entrance. Where the rector has an undoubted right, and a judgment to exercise, his consent directly given, ought to be obtained: great inconvenience would arise, if from the absence of the rector, his silence or his neglect; his consent in such a matter is to be assumed by implication. It is pleaded that the consent of the parishioners has been given, and that the rural dean has approved of the alterations, these circumstances may tend strongly to show the propriety of the alterations, but they do not affect the question of law; the seventh Article is not brought forward as a main consideration in this case, though I do not say, that if great offence were given to many of the parishioners, that it would not be the duty of the Court to bestow upon it very serious attention; the eighth does not appear very relevant; the remainder I will presently advert to.

These proceedings were not authorized by law, and if this allegation were admitted, it would merely cause unnecessary expense; for if every fact were proved, I could not say that these churchwardens had proceeded according to the law of the

land ; and I cannot think, that the counsel would desire proof of this allegation to be taken, and expence incurred, merely to show that they, the churchwardens, had acted with laudable motives.

They are entitled to the benefit of the presumption that they have so acted, but still their conduct is incapable of legal justification.

The remaining Articles could not in any view of the case be admitted, it is not competent so to impugn the conduct of the incumbent ; if it were improper the churchwardens might have proceeded against him ; but as a matter of defence to a suit of this description the Court cannot receive such averments ; with respect to Gillson, if he be the same person who signed the bond he is incompetent as a witness ; the eleventh Article therefore is unnecessary.

I must reject this allegation, but in so doing I impute no blame to the churchwardens, in their having mistaken the law.

The Court having rejected the allegation, the churchwardens withdrew the negative issue heretofore given, and gave an affirmative issue to the libel ; whereupon the judge monished them to be more careful in future, and condemned them in the sum of £40, *nomine expensarum*.

The Court was prayed to direct the old path to be restored, but declined making any order to that effect without having first consulted the Bishop.

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A sentence pronounced in a cause on a proxy of consent by the parties interested, is conclusive, unless it can be shewn that such proxy had been unduly obtained.

JUDGMENT.

SIR HERBERT JENNER,

The deceased in this cause, Timothy Brent, died on the 27th of February, 1833, leaving a widow and two cousins-german, Richard and James Bligh, his next of kin, the only persons entitled in the distribution of his personal estate, in case he died intestate..

Shortly after his death three testamentary papers were found, purporting to dispose of real and personal estate, all in his own handwriting.

The parties benefitted under them are the deceased's widow, her nephew Mr. William Brent Brent, and Mrs. Jones Burdett, a niece of Mrs. Brent, and Adelina Brent Barrington, a god-daughter of the deceased, and her mother, who had an annuity. Mrs. Brent, the widow, and Mr. William Brent Brent were appointed executors.

These papers being imperfect it became necessary to bring them to the notice of the Court, and accordingly on the 4th of May, 1833, a decree was taken out on the part of Mrs. Brent, the executrix:

calling upon the next of kin to see the papers propounded. This decree was personally served on Mr. James Bligh, who lived at Derby, on the 7th of May, on which day another decree of the same tenor was taken out against Mr. Richard Bligh, which having been personally served upon him on the 10th, was returned on the 13th of May, being the fourth session of Easter Term in that year.

On the first session of Trinity Term, 25th of May, a proctor appeared for Richard and James Bligh, when the scripts were propounded and an allegation brought in.

On the second session the proctor for the next of kin exhibited a proxy from his parties, and the allegation was debated by counsel on both sides, when the Judge (my predecessor in this chair) admitted the allegation; a commission was then decreed for the examination of witnesses, but on the by-day after Trinity Term, 27th of June, the proctor for the next of kin exhibited a further special proxy from his parties, and declared under the authority of that proxy, that he proceeded no further in the cause; affidavits were then brought in, which having been read by the Court, and counsel having been heard thereon, probate of the script marked A., as the last will and testament of the deceased, and of the scripts B. and C. as containing together a codicil to the will, was decreed, and on the 4th July, 1833, probate passed the seal, the property having been sworn under 12,000*l*.

So far then, it appears that the Court having all proper and necessary parties before it by their proctors duly authorized—the papers having been propounded—the admissibility of the allegation debated—was of opinion that if the facts therein

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pleaded were established by competent testimony, the papers, however imperfect or informal they might be, would be entitled to probate; and the next of kin upon this enunciation of the opinion of the Court, exhibited a proxy consenting to probate being granted (waiving the formality of examining witnesses) upon affidavits of the material facts being exhibited. Upon this consent so given the Court acted, and on affidavits which, with reference to the circumstances of the case it considered to be sufficient, it pronounced for the validity of the papers, and the executrix took probate of them.

This decree of the Court, so pronounced, must, under ordinary circumstances, have been considered to be final and conclusive, not only on all the parties to the suit, but also upon those who claim through them, and it certainly was so considered by the next of kin themselves, who did not attempt to impugn its validity, or take any steps to procure a reversal of it, either by appeal, or by alleging any surprize or fraud practised upon them. In fact the probate remained unimpeached till the month of February, 1835, when certain affidavits having been exhibited, a motion was made to the Court, to direct a decree to issue, calling upon Mrs. Brent, the executrix, and Mr. William Brent Brent, the executor, the former *to bring in the probate* (such was the form of the motion), and to prove the asserted will in common form of law, or to shew cause why administration to the deceased, as having died *intestate*, should not be granted according to law (or in such other form as the judge might direct); this motion was made on behalf of Mrs. Loveday Watkin, the niece of Mr. James Bligh, who died in the month of August, 1834, and who had by

his will given the residue of his effects to her, and of Mr. Richard Bligh, the son of the other next of kin of the deceased, who had been appointed sole executor of his father, who died in October, 1834 ; so that both of the next of kin, the parties to the original suit, lived more than twelve months after probate of these papers had been decreed, without suggesting that any fraud had been practised upon them or either of them.

To lead this decree, affidavits of Mrs. Watkin, and of Mr. Richard Bligh, and of another gentleman of the same name, a barrister in Lincoln's Inn, who appears to be the heir-at-law of the deceased, though not a party in distribution, were exhibited, and upon hearing those affidavits read, the Court felt itself bound, under the circumstances therein stated, to direct a decree to issue, not calling upon the parties in the first instance to bring in the probate (which might have been attended with great inconvenience, though that was the effect of the motion to the Court), but to shew cause why the probate should not be brought in, and declared null and void, as having been unduly obtained.

This decree was personally served and returned into Court on the caveat day after Hilary Term, 17th March, 1835, when an appearance was given for Mrs. Brent, the party cited. An act on petition was entered into and has been concluded. In the course of these proceedings, the executrix, Mrs. Brent, having died, it became necessary to take out a decree against Mr. William Brent Brent, the other executor, which necessarily occasioned some delay, and which the court notices as accounting for this case having been so long pending. The act was brought in, concluded on the third ses-

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sion of Michaelmas Term, 21st November, when the proctor for Mr. Brent brought in his affidavits, and on the by-day, 8th December, the proctor for the other parties brought in his affidavits.

The case has been very fully and elaborately argued, and it now remains for the Court to pronounce its decision upon the matter submitted to it. It may be proper at the outset, to observe, that the Court is not at present called upon to express any opinion as to the correctness of the sentence pronounced in the original cause; it is not sitting as a Court of Appeal to correct the judgment of its predecessor, but simply to determine, whether that sentence, be it right or wrong, has been obtained by undue means or by imposition, practised either upon the Court or upon the next of kin, for it will hardly be denied that, unless some strong grounds of that or of a similar kind, are laid to induce the Court to believe that such has been the case, it will be its duty to reject the present petition, and to refuse to disturb the sentence already pronounced with the consent of those parties who were alone competent to oppose the validity of the papers propounded. If on the other hand, it should appear that the consent of the next of kin has been obtained by fraud, or misrepresentation, by concealment, or contrivance, or even by surprise, it will be not only the duty, but the inclination of this Court, as of all others, to take such measures as may prevent the parties who have been guilty of such improper practices from deriving any advantage from them. But the burthen of proof in such a case clearly lies upon the party who seeks to impeach the validity of the sentence, which, until the contrary is shewn, must be presumed to be well

founded, and accordingly the parties now seeking the aid of the Court, have commenced by exhibiting affidavits imputing misconduct of so grave, and serious a character to the parties concerned in obtaining this probate, as to constitute a strong *prima facie* case of fraud against them, and such as left the Court no alternative but that of issuing a decree against the executrix to the tenor already mentioned, calling upon her to clear herself, if she could, from the charges so *imputed* to her; this she has accordingly attempted to do, whether successfully or not remains to be seen.

Before entering upon the consideration of the facts disclosed in the act on petition and the affidavits, it will be proper to advert to the question of law, as applicable to cases of this nature; the Court has been referred in the course of the argument, to a variety of cases determined in the Courts of Equity, for the purpose of shewing that in those Courts parties have been relieved from the effect of deeds or contracts into which they had entered, not simply upon the ground of fraud, but on that of surprise, inadvertence, or of an ignorance of their real legal rights, (a) in cases where advantage had been taken of the poverty of a party, by the offer of a sum of money, which though it might appear large to a person in low circumstances, was greatly inadequate to the value of the property which he transferred, although no actual fraud was proved; (b) and also in cases of compromise, where one party had concealed from the other a fact, which might, if communicated to him, have induced him to de-

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(a) *Cocking v. Pratt*, 1 Ves. Sen. 400. *M'Carthy v. Decaix*, 2 Russ. & Mylne, 614.

(b) *Evans v. Llewellyn*, 1 Cox. 333.

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cline the compromise, (a) and certainly some of those decisions have gone a very considerable length in setting aside deeds and contracts of long standing, with respect to which no actual fraud appeared to have been practised.

It is not necessary, however, for the Court to travel into the particular circumstances of those cases, indeed they have not been cited so much on account of their circumstances, as for the principle to be extracted from them, which I take to be this, that in order to set aside a deed, it is not necessary to show actual fraud, but that Courts of Equity will look at the whole of the transaction for the purpose of satisfying themselves that the transaction is free from all suspicion, and had been duly entered into by both parties with a full knowledge of its effect, or at least that an opportunity had been afforded of knowing the real situation in which they stood, and of the effect which the agreement would produce.

In the soundness of these principles the Court entirely concurs, and it will consider the case now before it with reference to them, and if it shall be brought within the verge of these principles, it will apply the same remedy, as far as is within its power, by "opening that which was concluded, in order that the merits of the case may be brought forward and justice done;" (b) for though, as has been stated, this is the first case in which the effect of proxies in these Courts has come to be judicially considered, yet there can be no doubt, that if they have been obtained by undue means, the decree of

(a) *Gordon v. Gordon*, 3 Swanst. p. 400.

(b) Lord Hardwicke in *Kemp v. Squire*, 1 Ves. Sen. p. 206.

the Court founded upon an instrument so obtained, cannot be considered as final and conclusive.

The first charge is that of an improper delay in acquainting the next of kin with the discovery of these papers, and with the state and condition in which they appeared, for it is said, that these papers having been found on the 28th of February, 1833, no communication with respect to them was made to the next of kin, until the 4th of May, and it has been much pressed in argument, that this must have been for an improper purpose, but I confess it does not strike me what particular purpose was to be answered by withholding this information from the next of kin, nor do I see that they have been placed in a disadvantageous position by not having had earlier intelligence conveyed to them, or that they could have taken any other measures than those which they adopted when the fact was communicated to them. But at all events it is sworn, that as soon as the search amongst the deceased's papers was completed, and it was ascertained that no other testamentary papers were to be found, a case was laid before counsel for opinion, (27th of April, 1833) and the result of that opinion being, that the case must be brought before the Court on the 4th of May, the executrix having ascertained who were the next of kin, of which she was before ignorant, the decree to see the papers propounded was extracted, and at the same time a letter from the proctor of the executrix was addressed to each of the next of kin, to the contents of which I must more particularly advert, when I come to consider the proceedings to which it gave rise. That it was proper to institute a careful search amongst the deceased's papers to ascertain whether there was any other

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will, will hardly be denied, nor can I think there is any thing very reprehensible in not having communicated the discovery of these papers until that search was completed; whether it occupied more time than was absolutely necessary the Court has not sufficient means of judging, but not perceiving that the next of kin have been prejudiced by the delay, I think that circumstance may be laid out of consideration.

The second charge is, that the state and condition of the papers were withheld from Mr. Richard Bligh, of Lincoln's Inn, whom the executrix knew to be the heir-at-law of the deceased, and whom she also believed to be his next of kin, and it is alleged and sworn, that the facts and circumstances relating to these papers were purposely concealed from that gentleman, from an apprehension that he would have actively interposed in favour of his poor relations, and prevented them from being induced to do anything which might deprive them of the advantage of cross-examining the witnesses produced in support of these papers, or of pleading any thing material against them; and in the act on petition, as well as in the affidavits, circumstances are set forth in great detail, and a conversation said to have passed between Mr. William Brent Brent and Mr. Bligh in the month of November 1833, is related with great particularity, for the purpose of shewing that concealment was purposely practised with respect to him, that it must have been with an evil intention, and that the court must therefore infer that the same improper motive also operated to cause the delay in communicating with the next of kin. Without going through the contents of the affidavit it may be sufficient to state that the account

given by Mr. William Brent Brent, differs very materially from that which is to be found in the affidavit of Mr. Richard Bligh, denying the greater part of what is stated by that gentleman to have passed between them ; admitting indeed that he said that Mrs. Brent and himself believed him to be the heir-at-law, and at one time thought he might also be the next of kin ; but that they had afterwards ascertained that such was not the fact. Mr. Lynde, also, who has been accused of conspiring to keep the state and condition of these papers concealed from Mr. Richard Bligh, and of having been employed by Mrs. Brent to watch proceedings, positively denies that such was the fact, and asserts that so far from being present at the finding of the papers, as alleged, he never had seen them till called upon to swear to the fact of their being in Mr. Brent's writing ; that affidavit bears date 19th June, 1833, nearly four months after the death of the deceased. With respect to the intimacy said to subsist between Mr. Bligh and these gentlemen, which would have made it highly natural that they should have made this communication to him, it turns out that though Mr. William Brent Brent had been at school with him, and for some time there had been an intimacy between them, and that they had on one or two occasions within the last four years dined at the house of a mutual friend together, when they recognized each other as school-fellows and acquaintances ; and with respect to Mr. Lynde, that he and Mr. Bligh used occasionally to meet on business relating to the affairs of a joint stock company, of which they both were members, there was no such intimacy or intercourse between them as to render it probable that any

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conversation should pass between them relative to the affairs of Mr. Brent, further than that slight allusion to it which is mentioned by Mr. Lynde in the latter part of his affidavit, and if that gentleman and Mr. William Brent Brent were in communication with Mr. Bligh, he appears to have been very incurious, for to the latter he addresses no enquiries respecting these papers, which under the circumstances might have been not unnatural, and to the former those only to which I have just referred.

But in fact how was this concealment *purposed*, as it is said to have been, to benefit Mrs. Brent and her co-executor? Mr. Brent, the deceased, was a gentleman well known; he was in an *official situation*, and his death was publicly announced in the papers of the day, so that Mr. Richard Bligh could not have been ignorant of that event; indeed his conversation with Mr. Lynde shews that he was acquainted with it, and that he supposed that he had died rich; it is also sworn that the account of what passed upon the admissibility of the allegation being debated, was also given in the public papers, which it was natural for Mrs. Brent and Mr. William Brent Brent to suppose would be seen by Mr. Richard Bligh, when there would have been an end of their hopes of concealing the state of the deceased's testamentary papers from his knowledge, if in fact they ever entertained any, and Mr. Bligh would then have been in ample time to have interposed for the protection of his relatives; but it so happens, from whatever cause, that no steps are taken by him, the proceedings go on without interruption. Whether the account of what passed on this occasion escaped his observation, or whether his attention

was not particularly called to the circumstances, is perhaps not very material to inquire, though it is to be observed that Mr. Bligh does not so swear, all he says is, that "he was not acquainted with the real state and condition of the papers till November 1833," which may still consist with the fact that he might have known what had passed in this Court; but however that may be, the impression on the mind of the other parties must have been that he would see the report of the case in the daily papers, and therefore that all further attempt at concealment must have been hopeless.

But then it is said that Mrs. Brent continued to receive the rent of the freehold house in Burlington Street, which she knew she was not entitled to, as the freehold would not pass under these unexecuted papers; and it is argued that this is again a proof of *mala fides* on her part. But this part of the transaction has little to do with the question at present before the Court, it seems hardly to bear upon it at all; for what object Mrs. Brent could have had in withholding the knowledge of his rights from Mr. Bligh, after the papers had once been brought forward, is difficult to conceive; she must, as has already been said, have been impressed with the notion that Mr. Bligh would have seen the report of the case in the papers, and that that would have given him sufficient information on the subject to enable him to protect his own interest, which there was no reason to suppose he would be backward in doing; I cannot, therefore think that this circumstance carries the appearance of fraud any further; Mr. Bligh has also received that portion of rent which was due to him; and from the correspondence on this subject, which passed between

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him and Mrs. Brent's solicitor, and which is produced, it does not appear that he imputed any fraudulent intentions to Mrs. Brent on this account.

Again it is said, why not have recourse to Mr. Richard Bligh, for the purpose of ascertaining who were the next of kin, instead of taking the more circuitous mode of applying to Mr. Lynde, who was obliged to seek the information from another person, whereas Mr. Richard Bligh could have furnished it without difficulty ; to this I think the circumstances stated in Mr. Richard Bligh's own affidavit furnish a sufficient reply, namely, that no intercourse or communication had for many years subsisted between him and Mrs. Brent or the testator, so that it was not very likely that under those circumstances she would apply to him for information which she could obtain from a gentleman with whom she was upon terms of intimacy, and who was connected with the family of her deceased husband. Upon neither of these grounds, therefore, do I see any reason to impute fraudulent motives to Mrs. Brent or Mr. William Brent Brent in not having communicated with Mr. Richard Bligh ; or for supposing that they were actuated by any apprehension of successful opposition from him or through his means.

Having thus disposed of that part of the case which occupied so much of the argument, I now proceed to the consideration of that which is in fact the only question with which the court has any immediate concern, namely, that communication which passed between the next of kin and their legal adviser, which led to the signing of the proxy of consent. Now this I prefer to take from the letters and other

documentary evidence, rather than from the representation of any person speaking from recollection of what occurred several years ago.

That Mrs. Brent or Mr. William Brent Brent had kept up any communication with these gentlemen for many years is not averred in any of the affidavits before the Court, indeed the contrary is the fact; and it is sworn that they were ignorant, if not of their existence, yet of their actual condition; and the Court is by no means prepared to say from anything that appears, that Mr. Richard Bligh, still less Mr. James Bligh, was incapacitated by infirmity of mind or body from understanding the communications made to them, or from taking the necessary measures to protect their own interests; although it certainly is true that neither was in affluent circumstances; but it is of the less consequence to enter into this consideration, when the Court has the means before it of knowing what actually took place.

The first letter is that from the proctor of Mrs. Brent, it is dated the 4th of May, and is addressed to Mr. Richard Bligh.

The letter was as follows :

*Doctors' Commons,
May 4th, 1833.*

“SIR,

“On serving you with the process with
“which you will be served at the time this letter is
“delivered to you, I think it proper to inform you
“shortly of the circumstances which render such a
“proceeding necessary.

“Mr. Brent, your relation, died on the 27th of
“February last, and very soon after his death the

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“ testamentary papers of which I send you copies
 “ were found in a private box which he was in the
 “ habit of carrying about with him wherever he
 “ went; a very diligent and careful search for any
 “ will or other testamentary paper was afterwards
 “ made amongst his papers, and in every place
 “ wherein it was probable such papers might be
 “ deposited, but without success; no other testa-
 “ mentary paper of any description has been found.
 “ You will observe that there is an informality in
 “ the appearance of the three testamentary papers,
 “ and it is that informality which renders it necessary
 “ that you and Mr. James Bligh, as the next of kin
 “ of Mr. Brent should have the legal notice which
 “ the service of this process gives you of the pro-
 “ ceedings which Mrs. Brent, as the executrix, is
 “ taking to obtain probate of the papers.

“ The papers themselves will be open to your
 “ inspection, and any further information you may
 “ desire respecting them will be afforded to you,
 “ or to any person coming with your authority.

“ I am Sir, &c.

“ E. W. WADESON.”

The letter seems to be very proper for its intended purpose, which was to explain the nature and object of the proceedings, and the reasons which made them necessary; but it has been since discovered that an expression has been used by the writer of this letter with reference to the condition of these papers, which does not convey an adequate idea of their state: the word *informality* is found fault with, and it has been said that the papers are *essentially defective*, and should have been so described, or as *imperfect* and *unfinished*; now

admitting for a moment that there has been an unfortunate selection of this term, (though I do not altogether agree in the criticism which has been made upon it) to what does it amount? to what consequences does it lead? why it is said that this is the foundation of all that subsequently occurred: that the parties have been misled by this description of the papers, and that by this misrepresentation they had been induced to depart from their right. But surely this expression could have produced no such effect: copies of the papers accompanied the letter; and Mr. James Bligh had immediate recourse to his confidential legal advisers for his guidance, they therefore had the opportunity of judging for themselves how far this description of the papers was correct; or if they were incapable of forming an opinion upon the subject, the respectable practitioners of this Court, to whom they applied, were fully competent to advise them, and to prevent them from being misled with this information. That there was any intention to mislead on the part of the practitioner employed by Mrs. Brent is not contended; but it is urged that if the letter had that effect, the parties would be entitled to relief: without, however, acceding entirely to that position, it is sufficient to observe that it was not upon this letter that the parties acted, further than that it led them to consult with their advisers in the country, and through them with their solicitor and proctor in London, and it is impossible to read the letters which passed, without seeing that the greatest care and caution have been used in the whole conduct of the proceedings; and I confess I was quite astonished when I heard it argued that from this correspondence it clearly appeared that

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the parties had been taken by surprise, and that no time had been allowed for deliberation. This, at least, so far as it relates to Mr. James Bligh, is refuted by the bills of his solicitor, payment of which has been made by the executrix out of the effects of the testator, (and I have not yet heard there has been any offer to refund the sum so paid). But whatever may have been the effect of this letter, with it terminates the correspondence on the part of the proctor of the executrix, or rather I should say with the answer to this latter written by Mr. Richard Bligh, the next of kin, which does not convey to my mind the impression of this gentleman's incapacity, at least to the extent to which in the affidavits of Mr. and Mrs. Snell, produced at a late period of the cause, it is represented to have prevailed : and I may as well here observe, that in my opinion there is no part of this transaction which is calculated to detract from that high character which the proctor of the executrix has hitherto maintained in his profession ; so far from it, he appears to me to have conducted himself with the most perfect propriety throughout ; and when it is said that the proxy of consent was signed at his urgent instance, I must say that it is a charge made without any just foundation, and that I place the most implicit credit upon the denial of it by the proctor ; I must further add, that the documents produced by Mr. Richard Bligh, annexed to his second affidavit, refute the allegation : and ought to have prevented it from being hazarded. The rest of the correspondence passes between the solicitors of Mr. James Bligh, their agent in London, and the proctor employed in their behalf, so that if any misinformation has been given in the latter stages of the

proceedings, it is not to be attributed to the executors and their advisers, unless indeed it be contended that they were in league with the advisers of the next of kin, and conspired together with them, to mislead and impose upon their employers: the incredibility of such a charge carries with it its own refutation.

Acting then under the directions of Messrs. Radford and Buckston, Mr. James Bligh authorizes an appearance to be given for him, he signs the proxy, which is then forwarded to his brother, who also executes it, and transmits it to Mr. Taylor in London, as appears from an item in this gentleman's account, entered under the date of the 30th of May, "*Postage of letter from Mr. Richard Bligh, with proxy executed by his brother and himself;*" Counsel are then retained on behalf of the next of kin; the allegation propounding the papers is brought in, the admissibility of it is debated, no doubt considering the counsel who were employed, with zeal and ability, and the result is that the Court expresses its opinion, that if the facts pleaded should be established, the validity of the papers must be pronounced for; that the Court expressed its opinion in pretty decisive terms, may be concluded from the proposition made by the proctor of the executors, that the examination of witnesses should be waived, and the probate permitted to pass upon affidavits only; such a proposal it is probable, would not have been made, if the Court had expressed any doubt upon the subject, and knowing the integrity and ability of the proctors for the next of kin, I may safely conclude, that they would not have advised their parties to accede to the proposal, if they had seen any prospect of succeeding in their further op-

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position to the probate of the papers. This proposal however, is communicated to their employers in their letter of the 3rd of June, in which they also inform them of the admission of the allegation, and the manner in which the judge had expressed himself with respect to it, and the letter concludes with a recommendation that they should accede to the proposal, with an intimation, that if further opposition should be offered, after the Court had so decidedly expressed it's opinion, they thought that the further costs of such opposition would not be allowed by the Court; whether this impression was altogether correct has been made a question, but whether correct or not, it is to be recollected that it came from the professional advisers of the next of kin, and is not chargeable upon the other parties; that it was the honest impression of the practitioner, and that it was expressed to the parties, for the purpose of preventing unnecessary litigation and expense cannot be doubted: together with this letter the allegation as admitted was forwarded, so that the parties had an opportunity of knowing what facts were pleaded, and of judging for themselves what probability there was of being able to rebut them, or to produce an adverse impression on the Court, by the cross-examination of the witnesses.

The correspondence however continues, and it appears, that conferences take place between Mr. James Bligh and his solicitors, whom he authorises to say, that on being furnished with affidavits verifying the allegation or certified copies of them, and being satisfied as to the paper marked D., of which a copy had not been forwarded, he should be disposed to consent to the passing of a pro-

bate, and to recommend his brother to do the same.

In consequence of this letter the affidavits are forwarded, the parties are satisfied, and sign the proxy of consent, Mr. James Bligh still acting under the advice of his solicitors and the information derived from his proctor, this proxy forwarded by Mr. Taylor to Mr. James Bligh on the 12th of June, was sent to Mr. Richard Bligh on the 14th, when it was received by him does not appear, but it did not return to London until the 24th of June, on which day there is the postage of a letter charged in Mr. Taylor's bill from Mr. Richard Bligh, inclosing the proxy, so that there was an interval of ten days between the dispatch of the proxy from Derby to Mr. Richard Bligh in Devonshire and the receipt of it in London; what may be the time requisite for the transit of a letter from Derby to Devonshire, and from thence to London, the Court has no information, but probably it would not occupy the whole ten days, so that there would have been time for Mr. Richard Bligh to have perused and considered this instrument, and not to have executed it in such a hurry as is represented by the Snells, "in consequence of the peremptory commands of his brother;" neither the letter accompanying the proxy from Mr. James Bligh, nor that written by Mr. Richard Bligh to Mr. Taylor is produced, so that the Court has not the means of judging how far they would bear out the statements of the Snells, either as to the peremptoriness of Mr. James Bligh, or the want of capacity of Mr. Richard Bligh, to understand the contents of the instrument or its effect; at all events, Mr. James Bligh, whose letters to his brothers are produced, treated him as

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a man capable of understanding what was written to him, and, as has been seen, he was equal to answer the letters which he received ; the Court therefore is not inclined to take the account of this gentleman's state of capacity from the affidavits of these persons, and if it be true that he did at any time express himself, as to lead to the supposition that he misapprehended the effect of the proxy, it probably was at a later period of his life, when Mr. Richard Bligh, of Lincoln's Inn, states that he received an incoherent letter from him on that subject ; but it is said that he acted in obedience to the dictation of his brother, as he had been accustomed to do for some time ; if so, I incline to agree with Dr. Haggard, that we must look to the means which Mr. James Bligh possessed of satisfying himself, and these appear to have been ample.

But it is again said that this proxy was conditional only, namely, that the parties were to have the protection of the Court ; if so, the condition was fulfilled, for the Court read the affidavits and was satisfied, and, though many of the averments contained in the allegation were not mentioned in the affidavits, they in fact proved themselves, for there could be no doubt of the affection which Mr. Brent entertained for Mr. William Brent Brent and his sister, who are represented by Mr. Richard Bligh, to have been taken into the deceased's family at an early age ; his adoption of them is proved by the royal license for their change of name, and the constant use of it by the testator ; by the expressions in one of the testamentary papers, and indeed by the whole contents of them ; I cannot, therefore by any means agree that there was any

material deficiency in the proofs adduced, or any substantial ground for supposing that the interests of the next of kin were lost sight of by the Court ; but as I before observed, I am not sitting here to say, whether the Court at that time came to a right or wrong conclusion as to the sufficiency of the proofs, my duty being simply to consider whether the proxy consenting to probate on affidavits, was obtained by improper means.

Upon this point I am perfectly satisfied, and am clearly of opinion that no imputation whatever rests either upon the memory of the late executrix, or upon Mr. William Brent Brent, who is the party now before the Court, or on Mr. Lynde, or upon any person concerned in conducting the proceedings on their behalf ; with what motives or for what purpose the present proceedings have been instituted I will not stop to inquire, I will not even venture to surmise, whether the prime mover in the business, has been actuated by a sincere desire to protect the interests of his poorer relations, or with a view to a possible advantage to himself ; it is sufficient for me to say, that the proceedings have in my opinion been improperly instituted, and that there is no pretence whatever for the charges which have been so liberally brought against a number of highly respectable individuals ; I therefore reject this petition, and I feel that I should ill discharge my duty to those individuals, or to the public, if, with a view to check such conduct in future, I did not also condemn the other parties in the costs.

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IN THE GOODS OF HENRY BINCKES, DECEASED.

1836.

EASTER TERM,
May 13th,
4th Session.

An administra-
trix becoming
a lunatic, ad-
ministration
granted, limit-
ed during her
lunacy. The
letters of ad-
ministration
being first im-
pounded.

Henry Binckes late of Little Newport Street, in the county of Middlesex, died intestate on or about the 19th of October, 1826, leaving his widow and several children him surviving; in the following month of November, letters of administration of the effects of the deceased were granted to the widow, who, in the month of November, 1832, became, and still continued to be a lunatic. *Lushington* prayed the Court to revoke the administration granted to the widow, and to grant an administration to Henry Edwin Binckes, one of the children of the deceased, and cited Phillips dec. 2 Add. 335, and Crump dec. 3 Phill. 497.

The Court declined to revoke the administration; but granted administration of the effects of the deceased to the son, limited during the lunacy of Ann Binckes, the widow, the letters of administration heretofore granted to the widow being first brought into and impounded in the registry, in order to be re-delivered out in case of her recovery.

LEDGARD AND PARR *against* GARLAND.*On Petition.*

1836.

May 13th.

Sarah Garland died on the 31st October, 1835, leaving Joseph Garland, her husband, surviving.

Previously to the marriage of the deceased, certain property was conveyed to trustees in trust, to apply the interest and dividends thereof, for her sole and separate use during her life, and after her decease, the principal was to go as she might appoint by will executed by her, in the presence of, and attested by two witnesses. The deceased duly executed her will, with a codicil thereto, and thereof appointed G. W. Ledgard and R. H. Parr executors.

The deceased out of the savings of her property, placed in the hands of Messrs. Ledgard, Welch and Co., bankers, to her separate account, certain sums of money, and at the time of her death, there was a balance in their hands of £540. 2s. 6d. *Lushington* on behalf of the husband, contended that the balance in the hands of the bankers having been separated from the trust fund, the trustees on the death of the deceased had no interest therein—that the deceased had not disposed thereof, and that as to that sum the deceased was dead, intestate, and he prayed a *cæterorum* grant to the husband.

Phillimore and Nicholl, contra.

Where there has been a complete recital and execution of a power, and the appointment of executors generally, the husband has no right to a *cæterorum* grant—he may sue the executors.

SIR HERBERT JENNER,

I should have had no difficulty in this case; but considering it to be a matter more peculiarly applying to the learning of another Court, and understanding that an opinion of a learned gentleman, practising in the Court of Chancery, has been given on the question, I shall take time to consider the point.

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May 13th.

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JUDGMENT.

June 4th.

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Probate of the will of a married woman under a power, limited in such manner as will leave questions of construction for the decision of Courts of Equity.

SIR H. JENNER,

Sarah Garland the deceased, previously to her marriage, had certain property conveyed to trustees, with a power to her to receive the dividends and interest thereof during life, and to dispose of the principal fund by will, executed in the presence of, and attested by two witnesses.

The only question before the Court is, whether a certain sum remaining at the bankers to her credit, is to be included in the probate. The ground upon which it is contended that that does not pass, is, not that the deceased did not possess the power of disposing thereof, but that she has not disposed of it. That is a question of construction not for this Court to determine. The Court will grant probate to the executors limited to the settled property, and all accumulations over which the deceased had a disposing power, and which she has disposed of: that is the usual and most convenient mode, in order to give parties an opportunity of making their claims elsewhere. (a)

(a) The prayer on behalf of the executors concluded thus; "And the said Watson prayed probate of the said will and codicil of the said deceased, limited so far only as concerns the said leasehold messuage or dwelling house, and premises, &c., and the rents due, and to grow due thereon, also in and to the aforesaid sum of £29,138. 5s. 4d., three per cent consolidated bank annuities, and the interests and dividends due, and to grow due thereon, and also in, and to the aforesaid several Columbian, Spanish, and Chilian Bonds, and the monies secured by, and payable under the same, and all interest due, and to grow due for the same, *and also in, and to the said sum of £540. 2s. 6d., being the said balance of cash in the hands of the said Messrs. Ledgard, Welch and Co. Bankers,* and all accumulations, profit, proceeds, and increase therefrom arising, over which the deceased had a disposing power by virtue of the said indentures of settlement, and which she hath disposed of by her said will, and codicil accordingly, and all benefit and advantage to be had, received, and taken therefrom, &c.

The Court granted the probate limited as above, without the clause printed in italics.

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June 1st.

TAGART AND BAKEWELL *against* HOOPER AND HARRIS,
AND *against* SQUIRE.

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v.
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AND
HARRIS,
AND SQUIRE.

This was a business of granting letters of administration of the goods, chattels, and credits of Samuel Bourn, deceased, promoted by Helen Tagart, (wife of the Rev. Edward Tagart) and Henrietta Bakewell, (wife of Frederick Collier Bakewell) alleging themselves to be his lawful cousins german, once removed, and two of his next of kin, and praying administration against Henry Hooper and Elizabeth Harris, (wife of Joseph Harris,) asserting themselves also to be cousins german once removed, and two of the next of kin of the deceased, and also against Frederick Squire, a legatee named in a pretended codicil to a will of the deceased, which will, if not destroyed, has been so lost or mislaid, that it cannot now be found.

The interests of the asserted next of kin, were respectively denied by each other, and allegations propounding the same were asserted. (a)

(a) Upon an affidavit by Mr. Horatio Harris, the son of one of the parties, stating, "that he had seen in the possession of Messrs. Dunn and Dobie, the solicitors of Messrs. Tagart and Bakewell, a will of Ann Bourn, the mother of the deceased, which appeared to have been made pursuant to a power reserved in a certain deed of settlement, and on Mr. Harris requesting to see such settlement, (apprehending that the same might contain material evidence as to the family of the said Ann Bourn), Mr. Dunn acknowledged that he had seen the same, but refused to produce it to him;" A motion was made to the Court, by *Addams*, to grant a monition against Messrs. Dunn and Dobie, to bring into the registry the marriage settlement; This motion was opposed by the King's Advocate, who submitted that the Court had not the power to compel parties to bring in papers which are not *pleaded*, or proved to relate to the subject

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The parties, however, were admitted by Mr. Squire, as contradictors to the will—and an allegation was brought in on his behalf, propounding the testamentary paper (*b*); the cause afterwards came on for hearing.

The paper was found in the writing desk of the deceased, but the will which had been delivered into the deceased's possession, could not be found,

matter in issue in the cause, and more especially at the instance of parties whose interest in the cause is denied by the parties against whose solicitors the monition is prayed, and thus to compel them to produce evidence against their own clients, and the case of *Dyer against Caldwell*, 2 Lee's Cases, p. 17, was referred to.

The Court rejected the motion, intimating that on an admissible allegation being offered by the parties, the motion might be renewed with perhaps some success.

(*b*) The other parties were assigned to give in their answers to this allegation.

Tagart and Bakewell gave in their answers, Hooper and Harris did not give in any answers.

Witnesses were examined in support of Squire's allegation, and interrogatories were put to those witnesses on behalf of both parties.

On the fourth session of Hilary Term, the Proctor for Mr. Squire prayed publication. In consequence of no answers having been given in by Hooper and Harris, and their proctor having notwithstanding administered interrogatories, (not to the witnesses who could depose with reference to the codicil, but) to David Black Dobie and John Squire, who were vouched in the allegation as being the persons who searched among the deceased's papers, it was suspected that such interrogatories did not relate to the codicil in question, but merely to the question of *interest* before the Court; it was therefore submitted on behalf of Tagart and Bakewell, that if such were the case, it would be to their manifest injury, as they had not had an opportunity of cross-examining such witnesses, if publication passed generally, previously to the allegations propounding the interests were given in, and the witnesses examined thereon—that it would be allowing the disclosure of part of the evidence before the cause, (that is the *interest* cause), was concluded, contrary to the established practice of the Court.

The Court was therefore prayed not to decree publication of the depositions taken on the interrogatories administered on either side, until the proctor administering such interrogatories, declared that they solely related to the codicil in question, or until the interrogatories had been inspected, in order to ascertain whether they related in any manner

it commenced thus, "This is a codicil to my last will, and to be taken as a part thereof," it was dated the 10th of May, 1834, the deceased died in December, 1834, he had executed a will in 1815, and in 1826, a codicil, which he destroyed in the presence of Ann Skinner, the person benefitted under it; she had been a servant of the deceased's since 1821, the deceased had cohabited with her, and had a child by her, for whom, by the codicil propounded he had provided.

Lushington and *Nicholl* in support of the codicil.

Where a codicil is not dependent on a will—the destruction of the will is no revocation of the codicil. Supposing the deceased to have destroyed the will *animo revocandi*, (which is the ordinary presumption), why did he not also destroy the codicil if he intended to revoke it?

Supposing another state of facts, that the will was destroyed after the death of the deceased, in that case there can be no doubt that the codicil is valid.

Possibly the will is not forthcoming from some accident.

Although the ordinary presumption of law (the will not being forthcoming), is that the deceased destroyed it *animo revocandi*, where is the authority, that a codicil being in existence is also revoked?

The King's Advocate and *Haggard*, *contra*.

to the question of interest before the Court, and if so, that publication of the depositions taken thereon, should not pass until the conclusion of the cause.

The judge decreed publication to the proctor of Mr. Squire only, and directed publication to pass generally upon the other parties bringing in their asserted allegations.

The proctor of Tagart and Bakewell subsequently tendered his allegation, and the proctor of Hooper and Harris not being prepared with his, the judge dismissed them, and condemned them in the sum of 30*l. nomine expensarum*.

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Where a codicil is *shewn* not to be dependent upon the will, it is not revoked by the revocation of the will—otherwise the presumption is against the codicil, *Medlycott v. Assheton* (c). This paper is not only described as a codicil to the will, but is said to be part of his will, and the deceased was a professional man. What is there then to repel the presumption?

The deceased applied to Mr. Ellis for his will, the will was delivered into his hands, there is no proof that any one had possession of it afterwards, the law then presumes that the deceased himself destroyed it, and by so doing that he revoked the codicil also.

A codicil to a will pronounced for, the will itself not being forthcoming.

SIR H. JENNER,

The Court has very little doubt in this case. It is admitted that there may be circumstances under which a codicil to a will may be established although the will is destroyed; there never was a case in which there was a stronger moral obligation to provide for the person benefitted than in this.

The deceased, Samuel Bourn, died December, 1834, leaving property to the amount of 18,000*l.*, he was eighty-two years old at the time of his death, and he did not know that he had any relations: in 1821, Ann Skinner went to live with him, as a servant. He afterwards cohabited with her, and had a child by her. In 1826 he made a codicil, by which he gave all the bank annuities in his name, at the time of his death, (d) to trustees, the interest to be paid to her for her life, and afterwards the principal to his issue lawful, or unlawful.

(c) 2 Add. 229.

(d) About £5000.

The will to which that was a codicil, is not forthcoming. But it appears that in the year 1815, the deceased had executed a will, which he deposited with Mr. Ellis, in whose custody it remained until August, 1834, when it was delivered to the deceased, who said that he intended to make some alterations in it—this is the only will which had been executed by the deceased, of which there is any trace; if any other disposition of his property was made by him, it probably was by a codicil: there was however another paper in his possession, a draft, or rather a fair copy of a will prepared for execution; but it was never executed, nor does it appear who the persons intended to be benefitted under it were, as the names are cut out.

The paper propounded purports to be a codicil, and I must take it to have been a codicil to the will of 1815. The deceased was a professional man, and he describes it as a codicil: The paper was found in the deceased's possession, in his writing desk, there is no evidence that it was placed there by any one but himself.

It could not be dependent on the will of 1815, that being made long before the deceased knew any thing of Ann Skinner. There are some traces of another paper having been executed by the deceased; if so, that might be a codicil, but that is not forthcoming, it provided for Ann Skinner, and in consequence of a quarrel with her, he burned it in her presence; he might by that have given the benefit to Ann Skinner for life of the property left by the codicil propounded. The presumption where a paper in the possession of the deceased is not forthcoming at his death is, that he destroyed it: the persons benefitted by the will might be dead;

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and therefore it might not have been applicable to the deceased's then circumstances; but for the child he had a regard, and was under a strong moral obligation to provide for it. In all the cases referred to, there were circumstances which shewed that the codicils were dependent upon the wills; there is nothing here to shew that the codicil was contingent upon the existence of the will.

If then, I am not bound by any rule, I am inclined to pronounce for this codicil; so far from being bound by any precedent, it is quite otherwise; and whether the will was destroyed by the deceased, or by accident, or since his death, I think this codicil was intended by the deceased to have operation and pronounce for it accordingly. (e)

(e) Some difficulty having occurred as to the form of the decree, the judge directed it to be entered as follows, "— pronounced for the force and validity of the said script, marked A. &c., of Samuel Bourn deceased, to be, and contain so far as appears from the evidence in the cause, the *last will and testament* of the said deceased, and decreed letters of administration with the said *will* annexed, &c. No executor or residuary legatee being named therein.

STARNES *against* MARTEN.

1836.

TRINITY TERM,
June 21st,
4th Session.*Haggard* in support of the will.*Nicholl* *contra*.

JUDGMENT.

SIR H. JENNER,

A will pronounced
against on the
evidence of the
attesting witnesses
thereto.

in act of
capacity.

The deceased in this case, Ann Marten, died in December, 1835, the will propounded was executed

on 11th of April, 1821, in the presence of three witnesses *prima facie*; then the will is a good one, but the surviving executor being called upon to prove it in solemn form of law, it lies upon him to establish it; he has examined two of the attesting witnesses, the third being dead, and upon their evidence the Court must rely for proof.

The contents of the will do not tend to show that any fraud was practised upon the deceased. The Court must decide the case upon the evidence before it, the third witness being dead, his character is pleaded and spoken to in the usual way, I must therefore consider him to be a person who would not attest an act, knowing that it was fraudulent.

The deceased is proved to have been a person of imbecile mind, not capable of understanding any thing. The first of the attesting witnesses is Thomas Hards. The Court here read the evidence of this witness, and proceeded. (a) Undoubtedly this person

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(a) The deposition of the witness was as follows. "I was well acquainted with Ann Marten, deceased, I knew her intimately from the year 1819 down to the year 1824, about which time a brother of hers, who used to live with her died, she always used to live at East Farleigh while I knew her, I used, during the period I have mentioned, to visit at her house, and see her there of an evening frequently. She never spoke to me on the subject of her will, I do not recollect that I ever witnessed any will of hers." The last will and testament of the said Ann Marten was then shown to the witness, who further said, "I have particularly inspected the name and addition, 'Thomas Hards, Shoemaker, East Farleigh,' appearing set and subscribed to the attestation clause at the foot of the said will, the same are my handwriting undoubtedly; but I have no recollection of having written the same, and I disbelieve that I saw the said deceased sign the said will, or that I wrote my aforesaid name and addition on the said will, knowing at the time when I did so, that the same purported to be, and contain the said deceased's will. The said deceased, during my aforesaid acquaintance with her, was of unsound mind, and in my opinion incapable of making a will; I recollect having witnessed the will of George Marten, the brother of the said

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is deposing against his act, and if there were any other evidence showing the deceased to have been of sufficient capacity at the time, the Court would have no difficulty in pronouncing for this will; but the parties have declined to avail themselves of the opportunity offered them of producing further evidence.

The witness gives strong evidence of incapacity; he does not say that he attested the will as knowing that it was a will, and that the deceased was in a state of capacity, but merely that the signature is his, but that he did not know he was attesting the deceased's will; and the other witness speaks much to the same effect.

The Court must act upon the evidence brought before it, and it therefore pronounces against this will.

deceased, in the year 1821, (as I best recollect), and I suppose that the aforesaid will of the deceased in this cause, must have been then placed before me, and my signature obtained to it, without my understanding what it was, or purported to be; for I am sure had I rightly understood that it was a will of the said deceased, I would not have put my name to it as a witness on any account, I believe that the said deceased was in the room when I witnessed the execution of her said brother's will; but to the best of my recollection, she took no part in any thing which was done on that occasion, but sat in the corner during the whole of the time in her usual listless manner.



IN THE GOODS OF JOHN MARSHALL, DECEASED.

On Motion.

1836.

June 29th.

John Marshall deceased left a will, in which he appointed Thomas Marshall and Ann Marshall executors; probate was granted to Thomas Marshall, and a power reserved of making the like grant to Ann Marshall.

One of two executors having become lunatic, the probate brought in and a fresh one granted.

Thomas Marshall afterwards became a lunatic, and a transfer of the deceased's stock at the Bank could not, in consequence, be obtained. A double probate was taken by Ann Marshall, and *Lushington* prayed the Court to revoke the probate granted to Thomas Marshall, it having become inoperative.

The Court directed both probates to be brought in, and then revoked them, and granted a fresh probate to Miss Marshall, and therein reserved a power of making a like grant to Thomas Marshall, when he should become of sound mind, and apply for the same. (a)

(a) See in the goods of Henry Binckes, deceased, page 286.

*CASTELL against TAGG.**On the admission of an allegation.*

1836.

July 7th.

An allegation
pleading the
omission of a
legacy, by
mistake, in a
will, perfect on
the face of it,
admitted, and
the legacy pro-
nounced for.

Phoebe Tagg, widow, died on the 6th of December, 1835; on the 4th of June preceding, she executed a will, wherein among other bequests, she gave a legacy of two hundred pounds to her daughter, Anne Tagg.

In the beginning of the following November, the deceased being very ill, and being desirous of making a new will, and of adding fifty pounds to the legacy to Anne Tagg, sent to John Malleson, Esq., her executor, for the purpose of making such new will; Mr. Malleson being unable to attend, requested his brother-in-law, Mr. Henry Nisbett to wait upon the deceased, he accordingly did so, and being alone with her, he read over to her the will of the 4th of June, and in the presence of the deceased and at her dictation, increased the legacy to Anne Tagg, by adding in pencil "and fifty," and he also at her request, made other alterations in the said will; he afterwards copied the same, but by mistake, altogether omitted in such copy the legacy to Anne Tagg.

An original will was afterwards drawn from such copy, in which also the legacy was omitted; this will was executed on the 12th of November, the same was read over to the deceased by Mr. Nisbett, but neither he nor the deceased discovered the omission, nor was it discovered until after the death of the deceased.

The will of the 4th of June, with the alterations therein in pencil, and the copy made therefrom by Mr. Nisbett, were in the registry. An allegation pleading the above circumstances, was now offered to the Court, in order to have the legacy of 250*l.* inserted in the will of the deceased.

Haggard in opposition to the allegation.

The object sought by this allegation is, that the Court should pronounce for a legacy not mentioned or hinted at, in the will of the deceased.

If the rules of the Court would permit it, evidence would certainly be brought to establish this legacy; but the Court cannot in this case admit parol evidence, there being no ambiguity *on the face of the instrument*, that instrument disposing of the whole of the deceased's property.

The cases are too strong against such a principle.

Lady Bath's case (a); *Harrison v. Stone* (b); *Shadbolt v. Waugh* (c).

The principle is this, that the Court will not admit parol evidence unless there is *an ambiguity on the face* of the paper, and unless that ambiguity can be sufficiently explained by documents.

Court.—Can the Court admit parol testimony to raise the ambiguity?

I submit it cannot. The case which comes nearest to this, is that of *Blackwood v. Damer* (d) but there was no residue disposed of.

On this paper there is no ambiguity whatever, it is a perfect instrument.

Lushington in support.

The intention of the deceased is manifest; By all her previous wills, a legacy was given to the

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(a) *Fawcett v. Jones and Codrington*, 3 Phill. 434, 490.

(b) 2 Hagg. 537. (c) 3 Hagg. 570. (d) 3 Phill. 458, n.

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daughter, and that legacy was directed to be increased; the proof will depend not upon one only, but upon a variety of documents; if in this case the allegation is admitted, there could not possibly be any doubt of the deceased's intention; the oldest case is that of *Blackwood and Damer*, there, it is said, was an ambiguity on the face of the instrument by reason of there being no residuary clause; but that is not an ambiguity but a *deficiency*, and if you can allow the deficiency of the most important part to be supplied, *a fortiori*, you may supply a single deficiency.

What was the ambiguity in *Bayldon v. Bayldon*? (c) There was no ambiguity, it was an *omission* altogether, and the deficiency was shown by another instrument, there is no difference in principle between that case and the present.

Harrison and Stone was a case under peculiar circumstances; it was eight years after, and the drawer of the will was dead, but the Court in that case said, "here is no written document." What then am I to infer? why, that if there had been a written document the decision would have been different. I think that case an authority in my favour.

Lady Bath's was a complicated case, and it could not clearly be ascertained what were the intentions.

SIR H. JENNER,

In this case an allegation is offered, for the purpose of having a legacy of 250*l.*, to one of the daughters of the deceased, inserted in her will, and which from the draft, is clear was the deceased's intention.

The allegation pleads :—

First, The death of the deceased, and that she left property to the amount of 1200*l.* or thereabouts, &c.

Second, The execution of a will in June, 1835, and by that paper that a legacy of 200*l.* was given to the daughter; that the deceased having an intention to alter that will, directed a letter to be written to Mr. Malleson, the executor, which was accordingly done, that he not being able to go to the deceased, Mr. Nisbett, his brother-in-law, attended upon her; it pleads her perfect capacity, and that by her directions an increase of 50*l.* to the daughter's legacy was put down in pencil.

Third, That Mr. Nisbett immediately on his return home, reduced into writing the instructions received from the deceased, and that in making a copy therefrom, he inadvertently omitted the legacy to Anne Tagg.

Fourth, That Mr. Nisbett directed Samuel Fisher, a clerk of Messrs. Kinsman and Prichard, to make a fair copy for execution, and that he also therein omitted the legacy.

Fifth, The execution of the will on the 12th of November, and that neither Mr. Nisbett nor the deceased discovered the omission.

Sixth, Regard and affection of the deceased for her daughter and declarations of her intentions to benefit her, &c.

Seventh, That the will of the 4th of June, remained ever after in Mr. Nisbett's custody, and that it is in the same plight and condition with the various alterations in pencil, &c.

If then the Court is at liberty to receive evidence dehors the instrument, nothing can be clearer than the deceased's intention in this case: all the cir-

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The question then comes to this. Looking at the documents which formed the basis of the will can the Court admit parol evidence?

Cases have been cited to show that unless there is an ambiguity on the face of the instrument, the Court can in no case admit parol evidence in order to supply an omission.

I agree with Dr. Lushington that the term ambiguity is not properly applied to this case. In *Blackwood v. Damer*, there was no ambiguity, the omission of the residue must be considered a deficiency, but no ambiguity. The Court there looked to other documents and discovered the omission; that case then is a precedent for the present which is stronger in its circumstances.

In *Bayldon v. Bayldon*, the will purported to dispose of 50,000*l.*, and 5000*l.* were omitted; still that was an omission not an ambiguity, and the Court admitted evidence from written documents, which showed clearly what was intended.

In *Harrison v. Stone*, certainly, the Court would not admit parol evidence; but there oral testimony alone was offered, and the drawer of the will was dead—no documentary evidence at all was offered, but oral testimony only, which has never been received; but then if the drawer had been alive, it did not appear that the Court would not have allowed that.

I think that this is an allegation which ought to be admitted, and if proved, that it will be sufficient to justify the Court in supplying the deficiency shown in this will.

The allegation being subsequently fully proved, the Court decreed letters of administration with the will annexed to Sarah Castell, one of the residuary legatees, the executor having renounced, the words and names, "To my fourth daughter, Anne Tagg, spinster, I give and bequeath the like sum of two hundred and fifty pounds," being first inserted and forming part thereof.

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JUDGMENT.

SIR HERBERT JENNER, (a)

The question in this case arises with respect to a paper which is propounded as a codicil to the will of the late Earl of Scarbrough, who died upon the 24th of February, 1835, in consequence of a fall from his horse, which immediately produced insensibility, from which he never recovered, and died within a very few hours afterwards. The late Earl left a widow, one son, and three daughters: two of these daughters were married, of whom one had become a widow: the third was unmarried. He left personal property to the amount of about 300,000*l*. The testamentary papers which he left behind him were a will of the 13th of October, 1826, and a codicil of the 8th of November, 1832. These

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Probate decreed of a paper, commencing "Head of instructions," and endorsed "memorandum," but concluding "this is my last will and testament," and signed by the deceased.

(a) The facts of this case are sufficiently set forth in the judgment of the Court.

The *King's Advocate* and *Phillimore* argued in support of the paper.

Lushington, Addams, and Haggard, contra.

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papers were drawn by his confidential solicitor, and were executed in the presence of three witnesses, and remained uncanceled and unrevoked at the time of his death. He had executed several other testamentary papers at different periods of his life, from the year 1790, or somewhere about that period, to which it is not very material for the Court particularly to refer.

The paper now propounded, and with reference to which the Court is called upon to deliver its opinion, is all in the handwriting of the deceased, is subscribed by him, and is dated the 11th of October, 1834 : the abbreviated words at the head of it, signify that it was made or written at Edwinstow, the place at which he was then residing ; and it is described at the commencement of it to be “ head of instructions to my solicitor, J. Lee, to add to my will the codicil following.” It goes on to state what the contents of that codicil were to be. There are initials for several of the legatees with the words “ &c. &c.” in many parts of it, and it concludes in these words, “ This is my last will and testament, Scarbrough ;” and it is endorsed, “ memorandum to J. Lee : will, October 11, '34 :” and the question is, whether this instrument so written by the deceased is entitled to the probate of this Court, as a part of his testamentary dispositions ; and this will very much, if not almost entirely, depend upon the character which is to be attributed to the paper itself. It may therefore perhaps not be necessary for the Court at any considerable length to go into the evidence which has been taken upon the allegation propounding it ; because, if the Court shall be of opinion that this paper is only what at its commencement it purports to be, namely,

mere heads of instruction to the solicitor to add a codicil, there would hardly be sufficient evidence to enable the Court to pronounce for its validity; but if, on the other hand, the Court shall be of opinion that something more is to be attributed to this paper than to a document intended to be mere heads of instruction, then the evidence given in support of it will be only in affirmance of that which is the legal character of the paper itself, so far at least, as the opinion of this Court goes, and it will not be necessary to examine it with so much minute criticism as in the other case supposed.

It may be necessary, however, to state shortly the history of the deceased, his family, and affairs. He was originally the Honourable John Lumley Savile, the youngest of three brothers, the eldest of whom having died in the year 1807, the next brother succeeded to the title of Scarbrough and the Scarbrough estates, and the deceased came into possession of the Savile estates under the will of Sir George Savile. Under that will he had a power of settling or charging those estates with an annuity of 1200*l.* for the benefit of his widow, and with a sum of 10,000*l.* for his younger children; and this power was exercised by him. In 1809, his eldest son, the present Lord Scarbrough, became of age, and recoveries were at that time intended to be suffered with respect to the whole of the deceased's estates, that is, the estates in Durham, Nottinghamshire, and Yorkshire; but that intention was executed in part only. In the year 1812, however, recoveries were suffered of the other estates, when a further annuity of 1200*l.* was settled upon Lady Scarbrough, and a sum of 30,000*l.* charged upon them for the benefit of his three daughters.

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In the month of June, 1832, the brother, the then Earl of Scarbrough, died, and the deceased succeeded to the title and estates, and further charges were made upon those estates for the benefit of his wife and children. I think a sum of 1,000*l.* a-year, and eventually and contingently an additional sum of 500*l.* a-year was charged upon those estates. In the year 1833, the present Lord Scarbrough engaged to pay Lady Scarbrough a further sum of 900*l.* a-year during her life, and after her death, 300*l.* a-year to each of his sisters, there being three of them ; making therefore in the whole 900*l.* a-year to be paid during their lives. But that engagement was conditional, that is, that he should retain the possession of both the Scarbrough and the Savile estates, so that if he were to lose one or the other of them, the engagement would not be binding upon him. There was also a sum of 25,000*l.* for the benefit of the daughters, in addition to the 30,000*l.* charged upon the Savile estates, and the 10,000*l.* settled. In June, 1833, actions of ejectment were brought by the nephew of the late Earl of Scarbrough for the recovery of the Savile estates ; and supposing the nephew to be successful in these actions, then the charges upon those estates, to which I have alluded, would have been of no avail, as in that case it is clear the Earl could have had no power to charge them as he had done, and the recoveries which had been suffered would be valueless, and these sums would be lost to the children of the deceased. In the year 1834, the particular period does not appear, verdicts were given in three of those actions in favour of the nephew's claim : whatever therefore might have been the Earl's apprehension in the

earlier part of the time, after these actions were brought by his nephew, as to the result of them, he could not but have been at this time impressed with the idea that there was at least a possibility that his nephew might finally succeed, and that his wife and daughters would lose a considerable portion of the property which he had settled upon them, and charged upon those estates; it was therefore not unnatural that he should contemplate the providing of a remedy for an adverse result. Now the provision made by the deceased by his will for his family was to this effect :—By the will of the 13th of October, 1826, which recites the settlement which had been made upon Lady Scarbrough out of the Savile estates, he gives her 1000*l.*: he gives her all his cash, bank notes, and bills of exchange which might be found in his houses at Rufford and Edwinstow at the time of his death; and he directs that plate, linen, china, household goods and furniture, to the amount of 500*l.* in value, shall be given to her absolutely: he also gives the residue of the plate to Lady Scarbrough during her life, and after her death to her daughter Anna Maria Lumley, that is, the unmarried daughter, who he probably thought would continue to live with her mother. He then gives to each trustee and executor 100*l.* and the residue of his personal estate and effects in trust, and directs them to sell the real estates, and to apply the proceeds of the sale to the payment of his debts and legacies. He then gives to his daughter Anna Maria Lumley the sum of 10,000*l.* to be payable, I think, one year after his decease, with interest, at the rate of 5 per cent. He gives to his daughter Lady Louisa Frances Cator, who had married without his con-

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sent, and with whom it does not appear he had at this time, October 1826, become perfectly reconciled, a sum of 10,000*l.*; that is to say, she is to have the interest of it for her life, for her sole and separate use, and at her death the principal is to be divided between her children; and if she has no children, then as she shall appoint by will; and if she makes no will, then it is to go to her sister Lady Anna Maria Lumley; and in case Lady Anna Maria should die before her, without having left issue, then it is to be divided equally amongst the testator's three nieces, the daughters of his late sister Lady Louisa Hartley: so that under this will the husband of Lady Louisa Frances Cator was to receive no benefit. He then gives to his brothers, the Honourable Savile Henry Lumley, the Honourable Sir William Lumley, and to his sister Lady Sophia Lumley, 10,000*l.* each. He gives to his three nieces, Barbara, Louisa, and Georgiana, daughters of his late sister Lady Louisa Hartley, the sum of 10,000*l.*, to be equally divided amongst them, with benefit of survivorship between them. He also gives to his three nieces, Eleanor, Louisa, and Harriet Milbanke, daughters of his late sister-in-law, Eleanor Milbanke, the sum of 10,000*l.* There was then reference made to a paper which would be found containing a list of servants to whom he gave a year's wages, but that paper, as I understand, has not been found. The testator then desired that the residue of his property should be divided into three equal parts, of which one-third was given to his sister Lady Sophia Lumley, and, in case of her death in his lifetime, between his two brothers, or to the survivor of them; and if they should both

die in his lifetime, then it was to go to the daughters of Lady Louisa Hartley; one other third part to the daughters of Lady Louisa Hartley; and the remaining third to Miss Gordon, the niece of his wife. He then directs the sale of an advowson at Winteringham, in the county of Lincoln, and of a real estate purchased by him in the county of York, the proceeds of which were to form part of the residue; and lastly, he appoints Henry Torre, Francis Swan the younger, William Pym, and Henry Gordon, executors and trustees; and the will is executed on the 13th of October, 1826, in the presence of three witnesses. So that by this will, Lady Scarbrough would take only 1000*l.*, and the use of the furniture and of the other articles mentioned, for her life; but, at the same time the will recites the charge which the Earl had made upon the Savile estates, and the settlement he had before made upon her. In the month of November, 1832, he executed a codicil to that will, by which he confirms the legacy previously given to Lady Scarbrough, and also gives to certain trustees a sum of 5000*l.*, for the purpose of enabling them to purchase a house and premises for her residence; and the codicil then goes on to explain the testator's intentions as to the bequests which he had made to the daughters of Lady Louisa Hartley, and then ratifies and confirms the will where it is not altered by that codicil, which is dated on the 8th of November, 1832, and is attested by three witnesses.

It therefore does appear, as was argued, that the deceased adhered to the disposition of his property, as contained in the will of 1826, and still con-

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tinued to do so, except so far as it was altered by this codicil; that he did still intend that the daughters of his sister should take the 10,000*l.* bequeathed to them in the body of the will as a specific legacy, and should also take, in the event of Lady Sophia Lumley and his brothers dying during his lifetime, the one-third part of the residue bequeathed to her, and also the one-third bequeathed to themselves immediately on his death; the Court therefore must take it that at this time the deceased did not intend to make any other provision for his wife and daughters by will, than that which is contained in these two papers. But then it is to be recollected, that at this period there was no question with respect to the Savile estates, upon which the annuities payable to Lady Scarbrough, and the provision for his daughters of 10,000*l.* and 30,000*l.* had been charged; but when the question did arise between him and his nephew, as to his right thus to charge those estates, it might be very necessary and proper that he should provide against a disadvantageous result, by taking care of the persons in whose favour he had made those charges; it was not only natural that he should have done so, but it is shown by positive evidence that he had contemplated doing it, as well as making a provision for the younger children of Lady Harriet Manners Sutton, who were inadequately provided for, by their father's will not having been properly executed. Whether that provision was intended to be made by a codicil, or by charges upon the Scarbrough estates, does not appear; but in the year 1833 these actions were commenced, and, as I have already stated, verdicts were obtained in

some of them by the nephew, though the question is not yet finally decided. I believe, indeed, that in one case the judgment has since been reversed; but in the month of February, 1835, at the death of Lord Scarbrough, a verdict had been obtained against him in some of these actions: therefore, however sanguine he might have been in the first instance as to his eventual success, there was at that time a strong presumption that another result might take place; and upon several occasions he appears to have expressed his intention of making an alteration in his testamentary dispositions: he expressed himself to this effect to the Rev. Mr. Thomas Manners Sutton, and he also made use of such expressions to his brother, Sir William Lumley, as led him to believe that he did intend to make that alteration. And though it may be true that a considerable length of time elapsed between the death of Mr. Sutton, the husband of Lady Harriet, one of the circumstances which gave rise to the necessity of making this alteration, and his communication of his intention to provide for the younger children of that daughter to the Rev. Mr. Sutton, and though after the actions were brought a considerable length of time intervened before he set about making these alterations, still he did so express an intention, saying, that it was necessary that a different provision should be made for his wife and children, from that which he had contemplated by these earlier papers; and however long he may have procrastinated, it is clear that upon the 11th of October, 1834, he did set about doing something with a view to carry his intentions into effect, for on that day the paper now in question before the Court bears date.

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It is admitted, on all hands, that this paper is in the handwriting of the deceased, and I think it is not denied that it was found in the situation in which it is alleged to have been discovered ; indeed there can be no doubt of the fact, for there is the evidence of the witness who actually found it in that situation ; and there is no reason whatever, from any thing that occurs in the course of the evidence or pleadings in this case, to suppose that this paper was placed there by any other hand than that of Lord Scarbrough himself ; and there is no reason to doubt, that, having had these natural causes moving him to make an alteration in the disposition of his property—having these calls upon him to provide against the inconvenience which might result from these actions brought by the nephew being decided against him—and having expressed his intention to make an alteration in the disposition of his property,—for that purpose he did proceed to do it by means of this paper ; and the question therefore to be decided is, what legal effect that paper is to have.

The Court has been referred to the principles which are applicable to papers which are either unfinished, unexecuted, or imperfect ; and the necessity of adhering strictly to the principles laid down in other cases, and of not departing from them, from any feelings of compassion for the situation of the wife and family of the present testator, has been strongly pressed upon the consideration of the Court. The Court has been also told, and very properly told, that its duty is to decide this case in the same manner as if the testator had been a person of inferior rank in life ; as if the property, instead of being 300,000*l.* had been 300*l.* ; and as

if, instead of giving large sums to different individuals to the amount of 50,000*l.* these legacies had only amounted to 50*l.*, or some comparatively trifling sum ; that if the Court is of opinion that this paper is not entitled to proof, it would be better to adhere to the general rules adopted and laid down, and not to depart from them with reference to any particular case. The Court, however, has not hitherto shown any disposition to depart from those principles, but, on the contrary, has expressed its intention to adhere strictly to them, and to apply them to the particular circumstances of each individual case, for it must be admitted that every case must eventually depend upon its own circumstances.

If then this paper is to be considered merely as “ head of instructions,” as a mere initiatory paper, the Court would feel great difficulty in holding it entitled to probate, because it appears by the date of the paper itself, that it was written early in the month of October, 1834, whereas the deceased did not die till the 24th of February following. There were therefore four or five months during which he might have carried his intentions into execution, either by sending this paper to his solicitor to be reduced into a more formal shape, or by writing to Mr. Lee to request that he would wait upon him, if he the deceased were unable or not disposed to go to Mr. Lee ; or in any other manner he thought proper ; and it would not, and could not, upon the principles acted upon by this Court, have been accepted as a sufficient excuse for not having completed his intentions, that he was unwilling to leave home during the hunting season, and that for that reason only he had put off the final execution of

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this instrument. But, as I have already stated, the question here depends very much, if not entirely, upon the character the Court is to give to the paper itself: (b)—Is it to be considered as mere “head of

(b) The Paper was as follows:

Edw^w. Oct^r. 11th, 34.—

H^d of Inst^{ts}. to my Solor^r. J. Lee, to add to my Will the Codicil follow^g.—

In add ⁿ . to my form ^r . beq ^{ts} , I leave	£.
To my Dear Wife L ^y . S. —————	80,000

or Intst. thereon, at 5 per Cent, out of my diff^t. Investm^{ts}.—& at her Dec^e. 50,000, of that sum to go to my Dau^r, L. F. C. & Childⁿ. for th^r. sole use & benf^t, &c. &c. —————

The rem^g. 30,000, &c. &c. —————

—Also to L^y. S. the Chart., open Car^e. & Pon^s; all my Books, Plate & fur. &c. &c. as then fo^d. sh^d. she prefer liv^g. at Edwⁿ. ————— £.

—To my Dau ^r . A. M. L., & L. F. C. each 20,000—	40,000
---	--------

—Do. — Dr. H. B. M. S. &c. &c. —————	10,000
--------------------------------------	--------

A Mour^g. Ring.

—Mt. est ^d . & val ^d . fd. W. W. Pym. Sen ^r . ^	1,000
--	-------

—Wor ^y . g ^d . fr ^d . & Neigh ^r . Rog ^r . Pock ⁿ . —	1,000
--	-------

—var^s. Stew^{ds}, Bai^{fs} & Serv^{ts}. (incd^s. Newb^{ts}.);

accd ^g . to th ^r . respt ^{ve} . mer ^{ts} . as L ^y . S. shall dir ^t . (exc ^s . R. P.)	500
---	-----

Then & after all my other Legac^s, Just Debts & Law exp^s, depds. on the vex^s. & unj^t. (F. L.) suits are disch^d—

—The reside. of my Prop^y. to be divd^d. in three eq^l. pt^s. viz.

—To my Dr. L. F. C. & Childⁿ. for th^r. sole use & benf^t. one part.

—Dr. H. B. M. S. & her young^r. childⁿ. one part.

& one pt. between my Bro^{rs}. S. H. L. & Sir W. L^y. for th^r. j^t lives.—

—Then and after th^r. Dec^e., to be divd. betⁿ the 1st. & 2^d. pt^s. viz.

my Daugh^r. L. F. C. &c. &c., & my Dr. H. B. M. S. & her yog^r. Children.

—The same Exors & Trustees, &c. &c.

—To Mr. & Mrs. Gorn. 150 a year for th^r. lives. —————

This is my last Will & Testament

Scarborough.

It was folded up and endorsed.

Mem^m. to J. Lee

Will

Oct^r. 11 | 34.

instructions?" Is it to be considered as a mere paper to which the deceased had done nothing finally? Is there at least nothing equivocal in the character of the paper? True it is, that it begins as "Head of instructions to my solicitor, J. Lee, to add to my will the codicil following," and that the deceased then proceeds, as in writing instructions he might do, to designate the persons to whom the particular sums mentioned are to be given; but having gone on to make a complete disposition in terms which were at least sufficiently intelligible to himself, and which I suppose would have been equally so to Mr. Lee also, and having disposed of the residue of the property, and appointed the "same executors and trustees, &c. &c.," he concludes by saying, "this is my last will and testament, SCARBROUGH." If the Court is to be called on to say this is nothing more than head of instructions, not even instructions themselves, then the principles which have been adverted to must be applied to this case as to all others; but if it is something more than heads of instructions, if the deceased has described it as being something more, is the Court to throw aside any part of the description which he has given to it, by concluding it with the words "this is my last will and testament?" Why is the Court to pronounce this to be a mere paper containing heads of instructions, when the deceased himself says at the conclusion, "this is my last will and testament?" The mere signature of his name might not have been sufficient to give it any other character than that attributed to it at the commencement, namely, "head of instructions;" but when he declares under his own handwriting in the concluding words of

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the instrument, for I take these to be the concluding words of the instrument, "this is my last will and testament," notwithstanding the indorsement which appears upon it, "memorandum to J. Lee—will," the Court can come to no other conclusion than that these words mean that the paper is to be considered as being the last will and testament of the deceased: I confess it does appear to me, looking at the paper itself, and at all the circumstances that had occurred to make it necessary for the deceased to provide against an unsuccessful issue of the actions of ejectment brought by his nephew for the recovery of the Savile estates, and looking to the consequent derangement that would take place in the provision that he had made for his wife and children, that he did mean this as something more than head of instructions; and that when he wrote it, he did intend it to be that which he describes it to be, not perhaps strictly, his last will and testament, but a part of it, namely, a codicil to it, because the bequest made to Lady Scarbrough is to be in addition to his former bequests: it must therefore be considered as a codicil to a previously existing will, and not strictly the will and testament, which are the words of the instrument.

But it is said that this is written on a scrap of paper; I do not however think that this is a proper description of it. I think the paper on which it is written shows rather more care and deliberation than if it had been a whole sheet of letter or note paper; the edges are cut so as to be perfectly straight and even, there is no inequality in it, there are no jagged edges, but it appears to have been carefully prepared for this purpose: the manner in

which the paper is written also shows that great care has been bestowed upon it, for there does not seem to be in any one part of it any correction, alteration, or interlineation: though it is true that there are abbreviations used, both with respect to the names of the legatees and with respect to certain other particulars contained in it; I cannot but think that greater care has been bestowed upon it, than if it were to be considered as nothing more than mere heads of instructions to be communicated to his solicitor.

It is true that this paper is very informally drawn, that it has numerous abbreviations in it, that it has these terms “&c. &c.,” and initials only to designate the legatees; and it is extremely probable that the Earl of Scarbrough did not intend that this should be a final act, that he did not mean that this paper should in its present form be the last act he was to do, by which his property was to pass: but I am to look to all the facts and circumstances connected with the case, to see whether he did not consider this paper as an operative instrument, until another should be drawn in a more formal shape; and whether he did not refrain from sending it to his solicitor, being satisfied and convinced in his own mind that he had done that which would carry his intentions into effect, provided he should not have an opportunity of giving instructions to Mr. Lee, or of leaving home for that purpose, which he is proved very much to have disliked during the hunting season; being satisfied that he had that by him which would be sufficient for the purpose if a more formal instrument should not be executed by him, but which he intended at some future time, when he had leisure and oppor-

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(tunity) to have prepared by his confidential solicitor Mr. Lee, whom he appears to have consulted for a long series of years in the preparation of his testamentary papers.

Notwithstanding the alleged informality of the paper, it will hardly be denied, that if the deceased had done with respect to it, as he had done to a paper which he had previously executed as instructions for a codicil or will prepared for him, by striking through those words which purported that it was instructions for a codicil, that this informality would not have prevented it from being entitled to probate; and I cannot think that the difficulty of construction which might arise as to some parts of the contents would have induced the Court to have refused probate. If then the Court is correct in that view, namely, that it would have been entitled to probate notwithstanding the legatees' names were merely expressed by initials, and some of the sums themselves not specifically disposed of, particularly the remaining sum of 30,000*l.* out of 80,000*l.*, but falling into the residue, which is specifically given to the two daughters; is that view to be affected or altered by the circumstance of the paper being described at its commencement as "head of instructions?" If not, there is sufficient proof upon the face of the instrument, that the deceased did not consider this as a mere paper of instructions, but that he gave to it a character which would entitle it to effect and operation, until a new and more formal instrument was prepared from it.

The Court having thus considered the appearance of the paper, and the inferences to be drawn therefrom, will now proceed to consider the effect of the evidence which has been given in support of it. I

entirely agree in the propriety of what has been urged, that the manner in which declarations are to be received must depend very much upon the nature of the instrument itself to which they apply, and that in the case of an informal paper there must be strong proof that the deceased did intend it to operate as a will. In the case of *Matthews v. Warner*, (c) the paper propounded was described as the plan of a will, and was signed by the deceased, there being no other description of it; and the conclusion of the paper was to the effect that he must not forget that he had some very good friends, and so on, and it was endorsed, "plan designed for the last will of Mr. William Matthews:" that paper had nothing upon it to show that the deceased intended it to be any thing more than that which he described it to be, a mere plan of a will: then I say, declarations to establish a paper of that kind must apply with the greatest force to the identical paper, so as to leave no possible doubt that the deceased did consider that in effect it was an operative will. Again, in the case of *Bone and Newsam v. Spear*, (d) the paper was described as heads of a will, or instructions for a will; still there being proof that it was the intention of the testator that that paper should operate as his will, and the Court being satisfied upon that point, notwithstanding its informality, acted upon it, and carried it into effect. But these cases, and a variety of others that might be cited, show, that whatever may be the form of the instrument, whatever may be its appearance, whatever may be its construction, in whatever terms it may have been expressed, or on

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(c) 4 Ves. 186.

(d) 1 Phill. 345.

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whatever material it may have been written, still the Court has only to inquire, was it the intention of the testator that that document should operate as his will? However informal or imperfect it may be, if you can be satisfied that the deceased did intend it to operate as his will, this Court is bound to give effect to it. > I agree entirely with the observations which have been made, that under certain circumstances you must draw certain conclusions; that if a person describes a paper to be a plan of a will, and there is no evidence to show that he considered it to be any thing more, you must consider it as such: you must not give it a character different from that ascribed to it by the deceased himself; but although it be described as the plan of a will only, yet if the Court is satisfied that it does contain the last wishes and intentions of the deceased, and that he intended it should operate as a will, then it is bound to give effect to it.

With respect to the paper now propounded, it is said that some parts of it may be difficult of construction; but that would not prevent its operation in those parts where it is clear. That can only be urged against it by way of creating a presumption that the deceased did not mean it to operate as his will, but in my apprehension that presumption does not go to any great extent in this case. Looking at the character of the Earl,—how unwilling he was to leave his home for business, however urgent, during the hunting season,—I see nothing on the face of the paper, in the shape of the paper, or in the difficulty of its construction, which would show that he did not intend it to have operation so far as it could. The question here undoubtedly is, not whether this paper is in all its parts a perfect will,

capable of being carried fully into execution ; but whether, so far as it is capable of being carried into execution, the deceased did not mean it to have effect. There may be a difficulty in construing the paper as to the bequest to the wife. He says, "I leave to my dear wife, Lady Scarbrough, 80,000*l.* or interest thereon at five per cent, out of my different investments ;" and it is said that it is not probable that Lady Scarbrough should hesitate in her choice between the interest of that sum at five per cent, or the whole sum of 80,000*l.* absolutely. That may be so, but there is no reason why he should not say, I will give her the choice. But then he goes on to state, that at the decease of his wife 50,000*l.* out of that 80,000*l.* should go to his daughter and her children ; and it is said that this shows that the deceased could not have intended to leave it in Lady Scarbrough's power to take the whole 80,000*l.* if she chose. Assuming that this 50,000*l.* is wholly to go to Lady Louisa Cator and her children, in the event of Lady Scarbrough choosing the interest of 80,000*l.* at five per cent instead of 80,000*l.* absolutely, then I see no reason why the deceased should not have expressed himself in this manner. With respect to the remaining 30,000*l.*, part of that 80,000*l.*, that is dependent also on the like contingency ; there is no specific distribution made of that sum, but there is of the residue, which is to be divided into three parts. The paper then purports to give to his daughters, Lady Anna Maria Lumley, and Lady Louisa Cator, each 20,000*l.* : these are absolute bequests. To his daughter, Lady Sutton, he also gives 10,000*l.* ; and then he goes on to give various other legacies, which it is not necessary for the

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Court particularly to advert to, and proceeds in this way—“ Then and after all my other legacies, “ just debts, and law expenses depending on the “ vexatious and unjust (F. L.) suit are discharged, “ the residue of my property to be divided in three “ equal parts. To my daughter Louisa Fra' Catorone “ part, to my daughter Lady Harriet Manners Sutton “ and her younger children one part, and one part “ between my two brothers” (naming them): these names are all expressed by initials: then it goes on to say, that “ after their decease it is to be divided “ between the first and second part, that is, my “ daughter Lady Louisa Cator, and my daughter “ Lady Sutton and her younger children, the same “ executors and trustees, &c. &c.; to Mr. and Mrs. “ Gordon 150*l.* a-year for their lives. This is my “ last will and testament, SCARBROUGH.” So that it appears to me there is no great difficulty in the construction of this paper: the bequest of 80,000*l.* for Lady Scarbrough, or the interest of that sum for her life at five per cent, and 50,000*l.* of that sum to his daughter and her children for their sole use and benefit, seems to me to present the only difficulty, because when the residue comes to be divided, it is perfectly clear; one part being given to Lady Louisa Cator, another part to his daughter, Lady Sutton, and another part between his brothers for their joint lives, and after their decease to be divided between the first and second parties, namely, his daughter Lady Louisa Cator and Lady Harriet Manners Sutton. In other respects, the construction of this will, as it now stands, does not appear to me to be very difficult, when the intentions of the deceased are to be ascertained; or any great doubt in carrying them into effect; at least none such to my

mind, as would prevent the Court from giving effect to this paper on that ground. Whether Mr. Cator is to receive any part of the benefit intended for his wife, or what construction is to be put upon that bequest, is not for me to decide: it is sufficient for me to see that there is a mode by which the intentions of the deceased may, with respect to the greater part of the contents of this paper, be effected, provided I should be of opinion that the circumstances under which it was found are such as to induce this Court to grant probate of it.

It remains then to consider the evidence which goes to support either one or other of the descriptions given of this instrument—Whether it is to be considered as mere head of instructions, or whether it is to be considered as an addition to the will of 1826 and the codicil of 1832, and intended as a guide to carry the wishes of the deceased into effect until a more formal instrument should be executed by him.

Now, in the first place, this paper is all in the handwriting of the deceased; it was found after his decease, though at a considerable period subsequent to that event, in his bed-room concealed in a part of the bed to which it was very unlikely any other person would have access. It is admitted that it was found there: when it was placed there, there is no evidence before the Court to show; because from the condition of the paper, and the dust which had accumulated upon it, it might have been there during a period of four or five months, or it might have been there during two or three only: it might have been placed there the day after the witness Newbart had seen the deceased writing it, when he deposited it in the black portmanteau in

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his bed-room. The place in which it was found clearly appears, from an inspection of that part of the bed which was brought up to the view of the Court, to have been a place of perfect concealment, but, at the same time, a place to which there was a great facility of access by the deceased. It is said, why was not this paper, if it was intended to have operation, deposited with the other valuable papers belonging to the deceased Earl? For this very plain reason, as I apprehend, and as was argued throughout by those who propound it; that it was not intended by the deceased as a final act—that it was not the only act he intended to do; but that it was a provisional act, to have effect only in case he should not execute a more formal instrument; for there is no reason to suppose, as far as the Court is able to judge from the evidence, that at any subsequent period the testator had an intention different from that which is here expressed. The paper being in this situation was within his own control; and it is clear, I think, that it was placed there by himself. The concealment too was perfect, for it was not discovered until the mattresses were taken off, and the lathes of the bed had been removed. It was also a place of security, because it was confined in its place by the pressure of a screw, and there was therefore no fear that it would be removed by the servants in making the bed; and the very circumstance of its being so placed may perhaps suggest a reason why the deceased only put initials for the names, in order that if it should be discovered by accident by the servants of the house, they should be at a loss to know the real persons whom he intended to benefit.

The paper, therefore, I must consider as having

been carefully written by the deceased, deliberately considered by him, and deposited in a place of security and concealment, for the purpose of being preserved. It is preserved, and comes now before the Court in the same state as it was when it left the deceased's hands. But, it is said, how can it be possible that the deceased should have deposited this paper in such a place, where the discovery of it was mere matter of accident, and where, but for that accident, the paper might have remained undiscovered down to the present moment? I think there is a very easy solution of that difficulty, if it is considered that the deceased did not necessarily intend that the paper should remain there till the period of his death. There is nothing to satisfy me, that if, in the ordinary course of nature, he had been ill for a few days preceding his death, he would not have disclosed where the paper was deposited. If he had had such illness, his mind not being impaired, and had died without making any disclosure of the place where the paper was, that would be a strong argument to be urged against the instrument, for it would show that he did not pay any attention to it, or that he had placed it there without any particular view; but dying, as he did, in this sudden manner, there is nothing in the circumstances of its remaining so long undiscovered, from which the Court can collect that he had in any manner departed from the intentions expressed in it.

Let us see then, whether the evidence given by the witnesses who have been examined in the cause, more particularly by one of them; and it cannot be denied that in point of fact the only important witnesses are those who proved declarations of the

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deceased ; whether that is not of such a nature as would satisfy all the Court has a right to demand in support of this paper : whether it would have been sufficient to support it as mere heads of instructions, or even instructions themselves, may be one question ; but the question here is whether the declarations spoken to by the witnesses ; with respect to the nature of which, and the impressions derived from which there could be no doubt whatever ; whether they are not sufficient to satisfy the Court that this was intended by the deceased to operate as a will. The witness William Newbart, though in an inferior situation of life, was a person to whom the deceased communicated many important particulars relating to his affairs and family. He states that he conversed freely with him on the subject of his daughter Lady Louisa Cator, and the manner in which she had married ; that he had been much displeased with her for marrying as she did, but that he had afterwards become reconciled both to her and her husband.

This witness was on terms of confidential intercourse with Lord Scarbrough for several years : with regard to the evidence given by him, I have heard no imputations attempted to be cast upon him, nor is it seriously contended that he ought not to be believed in the representation that he has given, whatever may be its effect. It is certainly said that he must be supposed to be acting with a certain degree of bias in support of an instrument by which Lady Scarbrough is to be so much benefited. It is contended that it is not unfair to suppose that he would have some bias in her favour ; but it has not been, as I understand it, seriously contended that what this witness says is not to be

taken as a true and correct representation of what did occur, so far as he is able to recollect and inform the Court.

He states upon the sixth article of the allegation, “ Lord Scarbrough was in the habit of talking familiarly with me on the subject of his family affairs; he employed me in confidential and private matters, and mentioned and confided to me many matters concerning his family.” Then, speaking of Lord Scarbrough’s dissatisfaction at the marriage of Lady Louisa Cator, he says,—“ I “ know from his own statements to me, that he was “ displeased with her on account of her marriage. I “ know also that he was afterwards quite reconciled “ to her marriage with Mr. Cator: he told me so; “ and of presents which he made her when he left “ Skelbrook, after he had been to see her there, “ Lord Scarbrough, after his accession to the title, “ often spoke to me concerning the estates to which “ he had succeeded, and also frequently complained “ to me of the law-suits in which he was engaged “ with his nephew, but not with reference to his “ will or any intended alteration of it, or any in- “ tended settlement of his affairs. The word ‘ will’ “ I do not recollect that he ever used in talking “ to me; and whatever he said to me regarding “ the settlement of his affairs, or the provision “ for his wife and family, was what he had done, “ not what he intended to do. He never men- “ tioned to me that the suits in which he was “ engaged with his nephew would affect the set- “ tlement on his wife and children, nor mentioned “ to me the circumstance of the younger children “ of Lady Harriet Manners Sutton being ill-pro- “ vided for. I recollect his telling me on one

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“ occasion, that Lady Harriet had been complaining
“ of poverty,”—and so on : and then he mentions
an observation about job-horses, and he says, “ I
“ never heard Lord Scarbrough say, that his would
“ be a rich widow.” Those declarations are spoken
to by other witnesses in the cause, Mrs. Pocklington
and other of the witnesses. But he does depose
that Lord Scarbrough did upon one occasion tell
him, “ that his widow would be well off after his
“ death; that occasion was the latter end of January
“ or the beginning of February, before he died, at
“ Edwinstow, when I was with him on business; he
“ had been reading a letter from Mr. Harrison, his
“ solicitor in London, indeed he had it in his hand, and
“ he told me that it related to the suit between him
“ and his nephew, and what provision he had made
“ to meet it, and that he had settled his affairs.”
This was in the month of January after a verdict
had been obtained against him in one or more of
the actions of ejectment brought against him by his
nephew ; and it would seem therefore that he had
been taking some proper measures to provide against
the effect which the adverse result of those suits
would have in the arrangements he had before
made with a view of providing for his wife and
family. Then he says, “ just as he mentioned these
“ words, Lady Scarbrough knocked at the door,
“ and his lordship said to me then, what was a very
“ common expression with him, ‘ don’t notice it.’
“ Lady Scarbrough did not remain in the room
“ more than a minute or two : and when her lady-
“ ship had left the room, Lord Scarbrough said,
“ ‘ Lady Scarbrough will be well off, and I have
“ made provision for them all.’ ” These are vague
declarations, referring to some paper which at this

time had been written by him. They are equivocal in themselves, supposing them to refer to that which has been argued to be heads of instructions only, because we know that persons who have written a paper of this description, intending afterwards to carry into effect what is there expressed, are very apt to talk with reference to such a paper of what they have done. Then he goes on to say, "it is impossible I can tell what he said exactly upon one occasion, or what he said on another, nor can I now give his very exact words; but I believe what I have now stated to be the words Lord Scarbrough used. On other occasions, about the same period, he has told me that they would be all provided for, or that he had taken care of them all. One of the occasions was when he was writing to Lady Harriet, and he told me that he was writing to her, and that he wished her to come and reside at Kelham, and 'poor Louisa,' he said, 'you know that I was very angry with her, but I have quite forgiven her, and I have provided for them all.'" Then in his deposition upon the ninth article of the allegation, he deposes with respect to the deceased's habits of hiding and concealing papers; but upon the tenth article he goes on to depose rather more specifically as to the writing of this paper than he does in the other articles, for his evidence here relates to what occurred some time after the paper had been written. He says, "I have seen the bedstead in which the paper is said to have been found, that is the bedstead on which Lord Scarbrough slept for some months before his death. Lord Scarbrough never to me, as I have said before, said that he should alter his will, or make a different dispo-

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" sition of his affairs. He never said to me that he
 " wanted to see and speak and must go to Mr. Lee,
 " his solicitor at Wakefield, in order formally to
 " settle his affairs. He talked of going to Mr. Lee,
 " and I was to go with him to Rufford to get some
 important papers there, to take to Mr. Lee; this
 " was not very long before his death. He three
 " times mentioned to me concerning a paper which
 " would be found, or rather twice; for the first
 " time, which was in the second or third week in
 " October before he died, he said that he was
 " writing his wishes, he had a paper before him at
 " the time." Now it was said that the witness was
 here adapting his evidence to the date of this will,
 but I cannot see any reason for supposing that he
 has not spoken to the best of his recollection. Then
 he says, " the second time was about Christmas
 " before he died, when he was ill; and complaining
 " of his illness, he said that a paper would be found:
 " and the third time, which was in January, (and
 " I am not certain whether he did not also at the
 " latter end of January or the beginning of Fe-
 " bruary,) he said that I was to bear in mind, as
 " he had told me before, that a paper would be
 " found. He did not on either of the two last-
 " mentioned occasions say that the paper would
 " contain his wishes, but I considered that he was
 " alluding to the paper I had seen him writing, and
 " in which he said he was writing his wishes."
 The witness could hardly be mistaken as to what
 Lord Scarbrough did actually say to him. He
 said a paper would be found: there he was right—
 a paper was found. In the first instance he says,
 he is writing his wishes; and he afterwards says,
 that after his death, a paper will be found—he tells

the witness to bear in mind that a paper will be found, as he had told him before. He did not say that that paper would be found to contain his wishes, but the witness presumes that was the case, because he had told him before, with reference to a paper which he was writing, that he was writing his wishes.

Upon the thirteenth article he deposes still more specifically. He says, “ On the occasion of which
“ I have before deposed, when I was with Lord
“ Scarbrough at Edwinstow, I went to him by
“ previous appointment. I am not certain whether
“ it was in the second or third week in October
“ before he died ; but I recollect on going to the
“ door of his dressing-room, which was the room
“ he usually saw me in, I found it fastened on the
“ inside. I do not recollect ever to have found it
“ fastened before. The servant, who went to an-
“ nounce me, knocked at the door, and informed
“ his lordship I was there ; upon which his lord-
“ ship came and unlocked the door, and I entered
“ the room : upon my entering, he said in his
“ usual way, ‘ Good morning, Newbart ! ’ and then
“ he said, ‘ You will wonder at my being locked
“ up, but one person or other comes teasing me so,
“ and that’s the reason.’ That is what he said as
“ near as possible. I saw he had a paper before
“ him ; and when we had conversed a little, he
“ said to me, ‘ I am writing my wishes, what I
“ wish to be done after my death.’ I am not cer-
“ tain whether he said, ‘ after my death,’ or ‘ here-
“ after.’ I answered, that ‘ I was glad to hear it ;’
“ upon which he said, ‘ Don’t notice it, don’t name
“ it to any one :’ he was in the habit of saying to
“ me, when he made any communication to me,

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“ ‘ But of course you won’t notice it.’ He then
“ placed it in the portmanteau which was on the
“ chair by his right hand side, and was used by
“ him to put papers in, which he had in use at the
“ time. I can’t say that it was the same paper
“ which I saw at Mr. Buckle’s office at York, but
“ it was of the same appearance, and, as far as I
“ can judge, of the same size. He did not fold
“ the paper up, he put it into his portmanteau just as
“ it was lying before him.” Then he goes on to say,
“ About Christmas-time afterwards, Lord Scar-
“ brough was complaining very much of his health ;
“ and on one occasion, when I went to him at Edwin-
“ stow, I found him leaning back in his chair ; and
“ he said, when he saw me, ‘ Good God, Newbart !
“ I don’t know what to do with my side,’ (he placed
“ his hand on his right side as he said it,) ‘ and the
“ back of my neck is so dreadfully bad that I don’t
“ know—or God knows—how soon it may take me
“ off.’ I said, ‘ I hope not, my lord ;’ upon which
“ he said, ‘ I don’t know ; what with that and my
“ legs teasing me so, I feel myself getting old ; but
“ if any thing should happen to me’—he did not
“ say suddenly—‘ a paper will be found.’” Now,
to be sure, nothing could be more strongly indi-
cative of a reference to a paper which was to have
effect after his death than these expressions ; and
this witness naturally concluded that he was refer-
ring to the paper which he had seen him write,
(and which was the same in appearance as that
which is now propounded) a few weeks before,
when he said he was writing what he wished to be
done hereafter, or after his death. It is clear that
there can be no mistake in the mind and recollec-
tion of the witness as to the substance of what was

said by the deceased. He appears then, clearly and decisively, according to the impression of the witness, to be alluding to something which was to have effect upon his death, with reference to the settlement of his affairs. Then he goes on to state, "he did not on that occasion tell me to bear it in mind, nor say that he had told me of it before; it was on another occasion that he told me, that he finished, as he usually did, by desiring me not to notice it to any one. I replied, 'Of course, my lord.' I do not recollect that either on this or on the other occasion Lord Scarbrough spoke of his wife or of his daughters; but he frequently, in conversations with me, spoke most affectionately of his daughters, and also of his wife. It was only upon one occasion that Lord Scarbrough said to me, that Lady Scarbrough would be well off upon his death, and that was on the occasion I have mentioned before, when he was reading Mr. Harrison's letter; but he twice told me that he had made provision for them all, meaning, as I believe, his wife, children, and grandchildren." That would accord with this paper, and not with the will of 1826 or the codicil of 1832, for those do not make a provision for all these persons. "Once," he says, "when he had been reading that letter of Mr. Harrison, and on an occasion before, when he told me of his being teased with begging letters; that occasion was in the January before he died:" so that we have the Earl writing a paper, as to which, he says, he is writing his wishes; and we have at Christmas an intimation given by him to this witness, that a paper will be found after his death if any thing should happen to him; and here we find him in

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January before his death, referring to the same thing. The witness says, "he was in his dressing-room, but not writing; there was a letter before him, and he appeared to have been writing. After he had said 'Good morning' to me, as he usually did, he said, 'here I am, Newbart! busy —you don't know how I am teased with begging letters. I am writing to my daughter Harriet: I want her to come and live at Kelham.' Then he went on to speak of Lady Louisa Cator, whom, after her marriage, he generally called 'Poor Louisa,' and said 'Poor Louisa, she disobliged me very, much, you know, but I am quite reconciled to her now.' He then made some further observations to the effect that there would be plenty for them all when he was gone, and that they would have no reason to complain; and on this occasion it was that he reminded me of the paper, and said, 'You will bear in mind, as I told you before, that a paper will be found;' and desired me, in his usual way, not to notice it to any one." This again could hardly be with reference to the will of 1826, or the codicil of 1832, for the actions between his nephew and himself respecting the Savile estates would have taken a large portion of what he had intended for his daughters, and which he had charged on those estates as part of the provision he had made for them.

It is impossible for the Court to doubt for one moment, or hesitate in believing, that this witness is really giving the words, as they occur to him, of the deceased himself. It is scarcely possible that words should be more conclusive, to show that the deceased intended by these declarations that the paper which was to be found should have some

effect on the provision he had made for his children after his death ; for so he expressly states in the conversation here detailed, where he says, that they will have no cause to complain ; and he reverts to what he had before told the witness—that a paper will be found. Coupling all these circumstances together, it seems quite impossible that the deceased should have referred to any other than a paper, not itself a complete will, but by which he had been desirous of guarding against the effects which might be produced upon the provision he had before made for his family by an unfavourable result of the actions brought against him by his nephew for the Savile estates. I do not know that it is necessary for the Court to go into the history further upon this part of the case : with respect to the declarations spoken to by this witness, every thing appears to me to concur ; and supposing these declarations to have been made, and that the witness is meaning to speak the truth, which I see no reason whatever to doubt, they seem to me to be utterly incapable of being misunderstood by him, nor is there any ground for suggesting that the deceased was not sincere in making them : he makes no discovery to the witness as to the place where the paper is deposited ; he does not state, you will find this paper in such a state, and such a place after my death, but he merely says ; after my death a paper will be found,—which must necessarily have reference, coupling it with what he had said before, to the provision to be made for his wife and children. That last conversation with him, he states, followed immediately on what the deceased said about his wife and children,—that they would have no reason to complain after he was gone.

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That expression therefore could have no reference to the will of 1826, or the codicil of 1832; as in the event of the nephew succeeding in the actions of ejectment, the more near and immediate relations of the deceased would have an interest very inferior to those who were more distantly related to him. I cannot therefore but think, that these declarations are to be received by the Court with some degree of consideration. I think they are very different from those which usually occur in cases where the Court is called upon to pronounce that a paper, originally intended as a plan of a will, or as instructions merely, is to be made operating and subsisting as a will, by the recollection of a witness who speaks to declarations made by the deceased.

This case, I say, differs from those to which I am referring, because I apprehend that this paper is of a different character and description, for it is declared by the deceased to be his will; and therefore these declarations are only confirmatory of the character which the paper is at least capable of bearing upon the face of it, and of the character which the deceased has given of it himself; and therefore using all that due caution with which declarations of witnesses are to be received upon the several grounds stated in argument, namely, the possibility of insincerity on the part of the person making them, the possibility of misconception by the person to whom they are addressed, and the possibility of misrepresentation, I think that in giving weight to these declarations, the Court is not doing any more than the testimony of the witness will fully justify. The declarations are such as appear in themselves to be natural, and there is nothing in the manner in

which they are related, or in the occasions upon which they are said to be made, which should lead the Court to suppose that the deceased was insincere in making them. He does not say "This paper is made to carry my intentions into effect," but he does say, "a paper will be found"—which has some reference to the conversation we have referred to, as to the arrangements of the deceased for making provision for his family.

It appears in the course of the evidence of this witness, that the deceased was talking of going to see his solicitor Mr. Lee, it is true that he had an interview with Mr. Lee in the early part of the month of October 1834, and at that time it was not stated in evidence that any communication passed between them on the subject of this will. It is very possible that there might not be any communication of that kind, but it is not at all unnatural to suppose, that when the deceased returned home, he might consider what was necessary to be done to guard against an adverse result with respect to these trials of ejectment, and that looking to the whole of his testamentary dispositions, and the provision which he had made for his wife and family before the litigation commenced, he might now, while the result was doubtful, consider it not right to give that large benefit to those for whom he had so handsomely provided at a time when he thought he had made ample provision for his wife and family. By this paper he does not take away the whole of the benefit he had originally intended for them, but he gives a large portion to those for whom by nature he was bound to provide. Although he did not in the month of October, 1834, communicate to Mr. Lee what his intentions were,

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or give him any instructions to prepare a will, yet he considered what was proper to be done, and he sat down and wrote this paper in the manner and form which, on the face of it, it purports to bear. It is in evidence in the cause, that the deceased was during the latter part of his life, talking of going to his solicitor Mr. Lee. There is no evidence that it was in reference to the preparation of a testamentary paper; but he was going to take some papers to him, and it is merely conjecture what those papers were. It might very possibly be, and it is not at all improbable that it was the will and codicil; but that is perfectly immaterial. He did not give this paper as instructions to Mr. Lee, but he kept it in his own bed-room, in the place where it was deposited by him. <It appears to me to be perfectly immaterial whether the deceased did or did not go with the intention of giving this paper to Mr. Lee. Had he given it to Mr. Lee as instructions to draw a will from, and then allowed four or five months to pass by without making any inquiry about it, that might have given rise to a question for the Court to consider, whether the deceased had not departed from his intention as expressed in that paper, and whether he did not consider this as mere instructions, as in the case cited of *Munro v. Coutts*. (a) There the question arose on a paper drawn out as instructions for a will; and though in some correspondence between the testator and his solicitor it was described as a will, yet clearly from the whole tenor of it, it was delivered to the solicitor as instructions only, and was not considered by him

(a) 1 Dow. Parl. Cases, p. 437.

as a perfect will ; and in point of fact it was in consequence of explanations which were required from the deceased, that the paper was in the unfinished state in which it appeared. So in this case, if the deceased had sent this paper to Mr. Lee to draw a will from, there would have been strong ground to consider it as a mere paper of instructions ; and if he had left it with Mr. Lee without making inquiries about it for three or four months, it might have given rise to a question of considerable difficulty as to whether the Court could consider it as a will or not. > But in order to try the sincerity of the witness Newbart, we must look to his conduct after the death of the deceased, and to the conduct of others also ; because, if from Newbart's representation to the persons who came into the house of the deceased immediately after his death, and by whom the search for this paper was conducted, they were impressed with the sincerity of Newbart's communications to them, and with the belief that he was telling them only what he believed to be true, as falling from the deceased himself, that at least affords a criterion by which we may judge what was their opinion as to the veracity and sincerity of the witness. What does he do immediately on the death of the deceased ? The will and codicil are found at Rufford in the deceased's depositories there ; and when Newbart sees the date of those papers, he is satisfied that they cannot be the papers to which the deceased referred ; he is satisfied that there must be papers of a later date than those, from what he had seen the deceased doing the second or third week in October, 1834, when he said to him, " I am writing my wishes—

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“ what I wish to be done after my death.” Newbart says, there must be a paper found somewhere or other, for the deceased had told him that a paper would be found ; and accordingly search is made, and that search is conducted with great minuteness and strictness, but still no paper is forthcoming. Newbart does not tell them that he saw the deceased put the paper into this black portmanteau, nor does it appear that this black portmanteau was searched very thoroughly ; it is opened to get some keys out of it, and for some other purposes, but Newbart does not say that he had seen the deceased put the paper into that portmanteau.

It is very possible that he might have imagined that the paper would be found where the will itself was deposited,—that would be a very natural supposition ; and that, although he had seen him put this paper into the portmanteau, it might have been removed from thence. Therefore it is not at all unnatural, that Newbart should not have made the disclosure that he had seen the paper put into the box the second or third week of October. But Newbart’s strong impression was, that a paper would be found, whatever might be its contents. That cannot be denied upon the face of this evidence. It cannot be denied that what he said made a strong impression on the persons conducting the search ; and though it is true that he, having declared he was certain a paper would be found, and that if it was not found he should think the paper had been destroyed ; when the search was made and the paper was not discovered, a kind of joke was passed upon him, and they appeared to be laughing at his story. But it by no means follows,

they did not believe the statement made by him as to what had been said to him by the Earl; and to show that they did place reliance upon his statement, the search actually proceeds, and is continued from the 24th February down to the month of May. I believe at that time all hope was given up of discovering the paper; but in the month of July, when the mattresses were removed from it, and the bed taken down for the purpose of being cleaned, this paper was discovered in the place described by the witness, who found it; and then it is that it is brought forward. I cannot conceive that any difficulty ought to arise in the mind of the Court as to giving credit to the deposition of Newbart; and there is no doubt as to the sincerity of Lord Scarbrough, in saying that a paper would be found whatever might be the effect of that paper; for the paper is found in his own handwriting, and signed by himself just about the period of time when the first communication passes, which is carried on by subsequent conversations between him and the witness Newbart. Is there any thing improbable in the deceased having put the paper in the place in which it was found? He appears to have been a person of a very suspicious mind: he appears to have been in the habit of hiding papers behind chairs and under mattresses. Papers have been found there. If he was in the habit of so hiding these papers, it is argued that it was extraordinary that these places should not have been searched before, other papers being found concealed in the bed and behind chairs, as is proved by a vast number of witnesses: that is so; but it is to be observed, that if the search had been conducted with the greatest minuteness, still this paper would, very probably,

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have escaped observation; for it could not have been discovered unless the laths under the mattresses were actually removed. It was in a place therefore, which it was very unlikely that any persons would have thought of searching for the discovery of such a paper. It appears to me that there is nothing in the circumstance of his selecting this place as a place of perfect security and concealment, or in his not communicating to any person where the paper would be found, he having met with this accident, and having died so suddenly in consequence of it as to be deprived of the opportunity of making such communication.

Now Sir William Lumley comes forward in a very honorable manner, and says, "This is what my brother meant: this is as it should be." Sir William Lumley will be a considerable loser by the establishment of this paper: he states his impression, and there can be no doubt of his sincerity in stating that impression to be, that it was a paper intended to operate. He says it was a paper which his brother would be likely to leave behind him, to guard against those inconveniencies which might arise, and which would prejudice the interest of his wife and daughters in the event of an unsuccessful termination of the law-suits between him and his nephew. It does not appear to me necessary to advert to the rest of the evidence. The witnesses all speak to one point, namely, the intention of the deceased to make some alteration in his testamentary arrangements; whether at an earlier or a later period is perfectly immaterial, for, at one time at least, he did not consider this to be a proper distribution of his property.

Whether the Court can say, that this paper shows

what was his final mind and intention must depend on all the circumstances of the case, he having died in a way which rendered him incapable of declaring more specifically what his intentions were. Looking then at all the circumstances of the case, at the necessity there was for his making the provision which he has made here ; looking also to what was done on a former occasion, for that is not altogether immaterial, namely, executing a provisional will, which was originally drawn up as instructions only to have operated till a more formal will was drawn, that paper having alterations and interlineations in it; looking at all these circumstances, I can have no doubt or hesitation in stating it to be my firm conviction, that the deceased did intend this paper should have full operation in case any thing should happen to him before he had an opportunity of going, or before it was convenient to him to go to Mr. Lee, for the purpose of having a more formal instrument prepared. Being of that opinion, and seeing nothing in any of the principles laid down and acted upon in this Court at all to militate against the views which I have here stated and expressed, I am of opinion that I must pronounce for the validity of this paper, and decree probate thereof to the executors, with the will of 1826 and the codicil of 1832; and I think that in a case of this description, the costs on all sides should be paid out of the estate.

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CONSISTORY COURT OF LONDON.

CHESTERTON *and* HUTCHINS *against* FARLAR.

On the admission of an Allegation.

THIS was a cause of Subtraction of Church Rate, promoted by Charles Chesterton and Samuel Hutchins, Churchwardens of the Parish of St. Mary Abbots, Kensington, *against* William Farlar, a parishioner. On the 13th July, 1835, the libel was admitted, which pleaded in substance,

First.—That on or about the 28th June, 1833, the Churchwardens and Parishioners, rate payers of the parish of St. Mary Abbots, Kensington, met in the vestry room, pursuant to due and legal notice given on that behalf, on the Sunday next preceding, and being so met then and there duly made a rate or assessment of fourpence in the pound on all properties in the said parish, so rateable, or on all the inhabitants of the said parish and others, so rateable, in respect to such properties for and towards the repairing, cleansing, preserving, supporting, and amending the parish church of the said parish, and defraying and indemnifying the Churchwardens of the said parish, of and in respect to all incidental costs and expenses, to which they might be put, touching or concerning their said office of Churchwardens for the year, from Lady-day 1833, to Lady-day 1834. That the said Rate was afterwards duly confirmed, and that in compliance therewith and in conformity thereto, by far the greater part of the inhabitants and others, rate payers of the said parish, have paid and satisfied

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the respective sums of money, to, or at which they were rated or assessed, in and by the said rate.

The *second* Article pleaded, That the said William Farlar, party in the cause, occupied a messuage, tenement, or dwelling-house, of the annual value of fifty-five pounds in the said parish, for or in respect of which he was rightly, and equally rated and assessed in the rate aforesaid, at the sum of eighteen shillings and fourpence, and that he also held other rateable premises described in the said rate, as a stable, of the annual value of eight pounds, for which he was rightly and equally rated at the sum of two shillings and eightpence.

The *third*, In supply of proof referred to the rate book and annexed a copy thereof.

The *fourth, fifth, sixth, seventh, and eighth*, were formal Articles, pleading jurisdiction, &c. and praying a sentence.

Additional Article.—That the said Charles Chesterton and Samuel Hutchins, the Churchwardens aforesaid, by virtue of their said office, caused the said William Farlar (and other defaulters) to be summoned on the twenty-third day of May, one thousand eight hundred and thirty-five, before two of his Majesty's justices of the peace for the county of Middlesex, for the Brompton district, in the said parish of St. Mary Abbots, Kensington, aforesaid, to shew cause why he refused to pay the said sums of eighteen shillings and fourpence, and two shillings and eightpence, so assessed upon him as aforesaid. That the said William Farlar accordingly attended such summons, but refused to pay distinctly on the ground of his objecting to the legality of the said assessment, in consequence whereof the said magistrates

declined to proceed for the recovery of the said rate or assessment.

An allegation was brought in on the behalf of Mr. Farlar by way of defence, to the following effect:—

First.—After reciting the first Article of the libel, and denying the same to be true, pleaded, That on the contrary, the rate was a partial and unequal rate or assessment on the properties situate within the said parish, and on divers persons inhabitants thereof, and owners or occupiers of properties therein. And that divers persons, who by law ought to have been rated and assessed in the said rate, in respect of their properties, and which persons have been and are rated and assessed, in respect thereof to rates made and levied for the relief of the poor of the said parish, for the said year one thousand eight hundred and thirty-three, are not rated and assessed to the said church rate, and thereby the properties and inhabitants rated and assessed therein are charged with the payment of sums of larger amount than they are by law liable to pay.

Second.—In supply of proof referred to two lists or schedules, wherein the several inhabitants of the said parish of St. Mary Abbots, Kensington, and the several other persons, and the properties not charged or assessed to the said church rate are specified, and set forth and pleaded that the said lists or schedules, entitled “Town lists of persons not charged to the church rates, Lady-day, one thousand eight hundred and thirty-three, to Lady-day, one thousand eight hundred and thirty-four,” and “Brompton list of persons not charged to the

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church rates, Lady-day, one thousand eight hundred and thirty-three, to Lady-day, one thousand eight hundred and thirty-four," were in the custody or control of the Vestry Clerk of the said parish, and might be produced if necessary at the hearing of the cause; and an extract marked No. 1, from the said lists was exhibited, setting forth about three hundred and sixty names.

Third.—That the said church rate was and is a retrospective rate, and was made to reimburse and indemnify the said Charles Chesterton and Samuel Hutchins, the other parties in this cause, for and in respect of payments made by them or one of them previous to the making of the said rate, and to provide for the discharge of several sums of money to a large amount, due or alleged to be due from the said parish of St. Mary Abbots, Kensington, to divers person, long previous to the making of the said rate. That out of the monies collected by means of the said rate, the said Charles Chesterton and Samuel Hutchins have reimbursed themselves divers sums paid and disbursed by them or one of them on account of the said parish, previous to the making the said rate, and have also paid and discharged divers debts and claims due or alleged to be due from the said parish to divers persons long previous to the making the said rate.

Fourth.—In supply of proof, referred to the original account of the Churchwardens remaining in the custody or controul of the Vestry Clerk, and annexed a copy thereof, marked No. 2, and pleaded that the following items in the account were payments made by the said Charles Chesterton and Samuel Hutchins, previous to the making the said rate.

1833.	FOR THE OLD CHURCH.	£ s. d.	1836.
March 6,	Paid for 100 bundles of fire-wood	0 5 0	EASTER TERM, April 28th. 2nd Session.
	Visitation fees for Easter visitation	2 12 0	
	Paid the pew-openers, quarter to Midsummer	7 16 0	
	The vestry-keeper, ditto	2 12 6	CHESTERTON and HUTCHINS against FARLAE.
	Ditto, washing church linen, ditto	1 14 6	
	Hollis, inspector of graves, quarter to Midsummer	1 11 6	
	Ditto, engine-keeper, ditto	1 5 0	
	Ditto, steeple-keeper, ditto	0 10 6	
	Ditto, bell-ringers, ditto	4 8 0	
	Mrs. Parsons, cleansing the church	1 0 0	
	Pope, organ-blower, quarter to Midsummer	0 13 0	
	Messrs. Starkey and Cripp, for Register Book for Baptisms	5 0 0	
	Paid the bearers an extra charge	0 3 0	
	Receipt stamps for burial fees	0 5 0	
		£29 16 0	

And that the following items on the credit side of the fifth folio of the said account—

UNPAID CLAIMS, OLD CHURCH.

Of Former Debts.

Mr. Shephard, consecrating burial ground	24 6 6
Ditto, certificate, 1832	1 6 8
Ditto, fees out of pocket, on case, 1832	3 5 6
William Lamb, for grave planks	24 10 11½
(For 1832) £53 9 7½	
Messrs. Judson, ironmongers	11 13 10
Mr. W. Hawkes, ditto	10 1 3
William Lamb, carpenter	9 7 7
Mr. Bird, repairs to church	28 0 7½
Messrs. Haines, for wine	9 12 0
Mr. Griffiths, linen-draper	2 11 4½
Mr. Benjamin Rowe, glazier	0 19 9
Mr. Gorham, winding clocks, Old Church	8 1 0
Ditto ditto Holy Trinity	1 1 0
Ditto ditto St. Barnabas	1 1 0
Miss Calcott, organist, to Lady-day, 1834	30 0 0
Mr. Calcott, ditto ditto	25 0 0
Carried forward	

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Miss Wilkinson, organist, to ditto	30	0	0
Mr. Hall, half-year to ditto	2	12	6
Mr. Lamb, December, 1832	0	5	6
Ditto, candles, ditto	5	5	5
Ditto, coals, coke, and wood, St. Barnabas	5	11	6

were payments made in discharge of debts due, or alleged to be due, from the said parish to divers persons long previous to the making of the said rate.

Fifth.—That in the year 1823, the population of the parish of St. Mary Abbots, Kensington, having greatly increased, a portion thereof was, under the authority of an Act of Parliament passed in the fifty-eighth year of the reign of his Majesty King George the Third, entitled “An Act for Building and promoting the Building of additional Churches in populous Parishes,” and other act or acts of Parliament passed subsequent thereto, formed into a district parish for ecclesiastical purposes, and the bounds and limits of such district parish were prescribed and defined as by law directed by the title or description of the Brompton District, that a new church was erected within the limits of such district parish, under the provisions of the said act or acts of Parliament, and on the sixth day of June in the year 1829, such Church was duly consecrated by the title of the Church of the Holy Trinity of the said Brompton District Parish. That from and after such consecration of such District Church, it became by law a District Church for all ecclesiastical purposes, and from such time the persons inhabiting such district parish are liable only to contribute to the repairs of the old Church of St. Mary Abbots, Kensington,

and were not, and are not liable to contribute to any rate made for payment of expenses incident to the performance of Divine Worship in the said old church. That notwithstanding the premises the said church rate was made, and the same is in the said first Article of the said libel pleaded to have been made as well for the repairing, cleansing, preserving, supporting and maintaining the said church, as for indemnifying the said Charles Chesterton and Samuel Hutchins from all costs and expenses to which they might be put, touching their office of Churchwardens, and they the said Charles Chesterton and Samuel Hutchins have, out of the proceeds of the said rate, paid and discharged divers sums of money to a considerable amount incident to the performance of Divine Worship in the said parish church, &c.

Sixth.—That under the authority of an act of Parliament passed in the fifty-third year of the reign of his Majesty King George the Third, entitled “An Act for providing an additional Burial Ground for the Parish of St. Mary Abbots, Kensington in the County of Middlesex,” the trustees appointed to carry the said act into execution borrowed a considerable sum of money upon the grant of annuities to divers persons, the payment of which said annuities were charged upon the fees to arise from burials in the said ground, and also upon the church rates of the said parish. That by the 19th section of the said act, the Churchwardens for the time being are required, until the whole of the principal money so borrowed, and the interest thereof, and the annuities to be granted should cease, yearly upon such day, in the months of June and July, as the trustees should direct, to render to the said trustees an account of the several sums of money which

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the Churchwardens should have received for or on account of the burial of the dead and the sums of money paid thereon, and to pay to the said trustees the balance remaining in their hands or so much thereof as should be necessary for the purposes of the said act, and the said Churchwardens are thereby further required to pay to the said trustees or their treasurer annually, out of the church rates by them to be collected, such a sum of money not exceeding the amount of threepence in the pound upon the annual rental of the said parish, as the trustees should think necessary for the purposes of the said act, and should by writing under their hands order and require by two equal half-yearly payments, until the whole of the principal money so borrowed, with the interest, should be discharged, and until the annuities granted should cease and determine. That the said Charles Chesterton and Samuel Hutchins have not rendered any such account to the said trustees, or paid to them or any of them any sum of money arising from the said burial fees or from the said church rate, and that without lawful authority they have, out of the proceeds of the said church rate pleaded in the said libel, paid and discharged the said annuities, or at least so much thereof as the balance of the said burial fees were insufficient to discharge, &c.

Seventh.—In supply of proof referred to the said account marked No. 2. (a)

Eighth.—That the said William Farlar was at and before the time of making the said rate, and still continues to be a resident inhabitant within the said Brompton District.

(a) The articles in italics were rejected by the Court.

This Allegation was opposed by *Addams* for the Churchwardens.

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The *King's Advocate*, and *Haggard* were heard in support of it.

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The Court inquired whether any further information could be given with respect to the purposes for which the rate in question had been made ; and on a subsequent day an additional Article was given in, pleading that the following further items in the churchwardens' account,

The trustees of the poor balance of the £500 borrowed from them on the old church account	£265	1	3
James Gorham, winding clocks to Midsummer	8	1	0
James Griffith, linen-draper	6	13	2
Messrs. Judson, ironmongers	21	12	5
Mr. William Hawkes, ditto	8	14	0
Mr. Bird, bricklayer	17	2	4
Mr. Richard Saunders, carpenter	5	6	4
Mr. Samuel Kingston, for coals	13	8	6
Mr. Samuel Kingston, for candles, &c.	10	19	7
Messrs. Haines for wine	20	16	0
Mr. William, stationer and printer	41	10	6
Mr. Hall, three quarters' salary, to Lady-day 1833, at 10 guineas	7	17	6
Mr. Shephard, consecration bill, old debt	42	1	4
Mr. Gorham, winding clocks, to Christmas 1832	1	1	0
Mr. William Collins, for furniture, old debt	42	9	0
Mr. R. Hanham, coals £4 0 0 } Carpenter, ditto 1 6 3 }	5	6	3
Mr. Kingston, for coals	10	12	0
Messrs. Haines, for wine	9	3	6
Mr. Benjamin Hughes, for lighting lamps	28	2	9
Mr. Shephard, consecration charges, old debt	48	10	4
Richard Saunders, carpenter, old debt	2	2	1

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were payments made in discharge of *debts* due, from the said parish to divers persons, long previous to the making the said rate, and in supply of proof it referred to the vouchers in the possession of the said Charles Chesterton and Samuel Hutchins, or of the vestry clerk of the said parish. (a)

DR. LUSHINGTON,

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 HILARY TERM,
 Feb. 12th.
 4th Session.

The question is, whether this Allegation sets up a sufficient answer to the libel admitted in this cause for subtraction of church rate.

With respect to the *first* and *second* Articles, there can be no doubt as to their admissibility, they allege the rate to be unequal.

In answer to a libel for subtraction of church rate, it is competent to a party to plead that the rate was intended to be retrospective, although the rate was not, *on the face of it*, retrospective.

The *third* and *fourth* Articles allege that the rate is retrospective, and the point is, whether I should admit evidence to shew for what purpose the rate was made, it being clear that a rate retrospective *on the face of it*, could not be sustained. If I were to exclude this evidence, the rate might be wholly retrospective, or for a purpose manifestly illegal, it might be for the purpose of paying for the prosecution of a criminal, for repairing a bridge, or making a road; I apprehend the law to be that the majority of the parishioners in vestry may, in making a church rate, bind the minority for a legal, but not for an illegal purpose; in matters respecting which the law allows a discretion, not as to expenses unconnected with the church.

It was said that an action of account would lie against the Churchwardens, but no such action has been prosecuted for two hundred years, and I

(a) The amount of the rate in question was £1483 15 0 $\frac{1}{2}$.

should not consider myself justified in leaving the parishioners to what is a remedy, rather in name than reality, it would be an argument equally good for any church rate whatever.

Another argument has been pressed upon the attention of the Court of greater weight, that in extensive parishes some expenses must remain unpaid, that the bills cannot always be got in and discharged during the current year; it may be so, and then a question would arise whether a rate should be held invalid because of the amount of debt left undischarged, and if a small portion only of the rate was intended to cover such expenses, I should not be inclined to pronounce against it; on the other hand, if the rate be retrospective to a very considerable extent, I am of opinion that the numerous decisions which have taken place in other courts, (a) pronouncing retrospective rates illegal, would necessarily lead me, under the circumstances stated, to refuse to enforce such a rate. I admit then the four first Articles.

The *fifth* Article raises the question, whether the inhabitants of the district are liable to the expenses of the Churchwardens of the parish: the inhabitants of every part of the parish, howsoever divided, are bound to contribute to the maintenance of the parish church, and all legal expenses incident thereto; but there are exceptions admitted by law, and in the present case, whether such exception exists or not, depends on the Church Building

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(a) See *Rex v. Chapelwardens of Bradford*, 12 East, 556. *Dawson v. Wilkinson*, Cases temp. Hard. 381; *Andrews' Rep.* 11. *Lanchester v. Tricker*, 1 Bing. 201; 8 Moore, 20. *Lanchester v. Frewer*, 9 Moore, 688; 2 Bingh. 361. *Lanchester v. Thomson and others*, 5 Madd. Rep. 4, and the Observations of Lord Denman in *Rex v. Dursley*, 5 Adol. & Ellis, p. 15.

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Under stat. 58
 Geo. 3, c. 45,
 sec. 71 the in-
 habitants of the
 district are lia-
 ble for twenty
 years to the
 incidental ex-
 penses in the
 same manner
 as to the repairs
 of the Mother
 Church.

Acts, the 71st section of the 58th Geo. 3rd, c. 45, expressly enacts, that “the district shall remain “subject for twenty years, to be accounted from “the day upon which the district church or chapel “shall be consecrated, to the repair of the original “parish church, and be deemed part of the “original parish, for all purposes of such repairs “and the making, and levying of rates for that “purpose.” I think that according to the true construction of this clause, the inhabitants of the district are liable to be assessed to the incidental expenses, precisely in the same manner as to the repairs of the Mother Church, indeed, were it otherwise, the necessary consequence would be great inconvenience and confusion.

I clearly think that what is alleged in the *sixth* and *seventh* Articles would not invalidate this rate; I therefore reject the *fifth*, *sixth*, and *seventh* Articles, and admit the rest of the allegation and the additional Article.

An allegation was afterwards brought in on behalf of the Churchwardens, in reply to that of Mr. Farlar, which now stood for admission, pleading,

First.—That in virtue of an act of Parliament, made and passed in the seventeenth year of his late Majesty King George the Third, for the better relief and employment of the poor of the parish of Saint Mary Abbots, Kensington, and also of an act made and passed in the seventh year of his late Majesty King George the Fourth, for (among other purposes therein mentioned) amending and

enlarging the powers of such acts aforesaid, and for better regulating the said parish, the landlords of all houses, of which the annual value does not exceed twenty pounds (and not the occupiers or tenants thereof), are made liable to be assessed to the relief of the poor of the said parish. And whereas in the first Article of the Allegation admitted in this cause on the part and behalf of the said William Farlar, it is alleged and pleaded “that divers persons, who by law ought to have “been rated and assessed in the said rate in respect of their properties, and which persons have “been and are rated and assessed in respect thereof to rates made and levied for the relief of the “poor of the said parish for the said year one “thousand eight hundred and thirty-three, are not “rated and assessed to the said church rate, and “thereby the properties and inhabitants rated and “assessed therein are charged with the payment of “sums of larger amount than they are by law liable “to pay.” And whereas in proof of the premises are annexed to the second Article of the said Allegation certain exhibits, purporting to set out the names of parishioners, in number about three hundred and sixty (being the names of persons rated to the poor of the said parish in the sums set opposite to each name, but), omitted to be rated in or to the church in the rate sued in this cause. Now the party proponent doth expressly allege and propound that of such parishioners two hundred and seventy are landlords, rateable to the poor, under the acts herein-before referred to, as landlords, but not rateable to the church, as not themselves occupying the houses of which they

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are such landlords. And the party proponent doth further expressly allege and propound, that it is not, nor ever hath been, the practice in the said parish to rate the tenants of such houses, whereof the landlords are rated to the poor under, and in virtue of the acts hereinbefore referred to, to the church, by reason that such persons, if not actual paupers, are in such indigent circumstances that no recovery from such persons, of such church rates could reasonably be expected, very many, and by far the greater part of such houses being let out in apartments or lodgings to different families or individuals. And the party proponent doth further expressly allege and propound, that upwards of seventy other parishioners, (both landlords and tenants) whose names appear in the said list as rated to the poor, and who therefore might seem liable in virtue of their occupation to be also rated to the church, have not been so rated, by reason that they are in circumstances of the greatest exigency, many of them receiving even parochial relief, and from whom no poor rates have been demanded, or, if demanded, could have been recovered, though rated to the poor in the said list.

Second.—That for many years previous to, and down to the year one thousand eight hundred and thirty-two, it had been customary in the said parish of Saint Mary Abbots, Kensington, that the church rate made on or about Lady-day in each year, should cover the expenditure of the year from the Lady-day preceding, so that such rates were to that extent retrospective rates as to occupation, though the party proponent doth expressly

allege and propound that the same were then, and had all along been, prospective as to expenditure. That in the said year, one thousand eight hundred and thirty-two, on objections raised by certain (though not objected to by the great body) of the parishioners of the said parish, it was deemed prudent, under the advice of counsel, to desist from such custom, and that in future the church rate should be prospective altogether, that is, with respect to occupation as well as to expenditure. That accordingly, the Churchwardens in that year, commencing to act upon such new system, and to defray the current expenses of such year out of the rates raised at the Lady-day preceding, were unable out of such rate also to liquidate altogether the outstanding demands of the next previous year (including some trifling sums due from the parish for the years preceding that, on current accounts, but which it was agreed on all hands were a charge upon, and proper to be defrayed from or out of the church rates of the said parish), and the party proponent doth further expressly allege and propound that in the said year one thousand eight hundred and thirty-two, William Farlar, party in this cause, being at such time one of the guardians or trustees of the poor of the said parish, himself induced the said trustees to lend and advance to the Churchwardens five hundred pounds, then in their hands, as such guardians or trustees, on the credit, and to be repaid out of the then future church rate and church rates, to assist in the part immediate liquidation of such outstanding demands; that of the said sum of five hundred pounds, two hundred and thirty-four pounds

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eighteen shillings and ninepence was repaid to the said trustees by the then Churchwardens, out of the church rate for the then current year, leaving the sum of two hundred and sixty-five pounds one shilling and threepence, due from the church rates at the time of the making of the church rate sued in this cause.

Third.—That in consequence of the premises in the next preceding Article pleaded, as also of the said parish having been lately involved in much difficulty and expense, consequent upon the then recent erection of two additional places of worship within the said parish, under the several Acts of Parliament, known generally as the Church Building Acts, at the time of the making of the rate sued in this cause, in addition to the sum of two hundred and sixty-five pounds, one shilling, and threepence, due to the said William Farlar, or to the trustees of the poor of the said parish as before set forth, there were arrears to be provided for (consisting principally of tradesmens' current accounts, or accounts running on from year to year, together with a few bills omitted to be sent in within the year in which the work charged for in such bills was done, or articles supplied), amounting to about the sum of from three hundred and fifty to four hundred pounds, and no more, less the sum of one hundred and twenty-seven pounds, four shillings and tenpence, due to the Churchwardens, from the assessment for the preceding year, and of which the greater part was afterwards collected and got in, as applicable to the payment of such outstanding demands.

Fourth.—That the vestry of the parish of Saint

Mary Abbots, Kensington, is not a select but an open vestry ; that the vestry at which the church rate sued in this cause was agreed to was numerously attended (to wit), at one time by upwards of seventy parishioners, the said William Farlar, party in this cause, inclusive ; that at such meeting, the report of a committee previously appointed, by the parish, to investigate as well the whole subject of, as the then outstanding claims upon, the church rates of the said parish, and in which report such outstanding claims were erroneously represented at the sum of four hundred and seventy-one pounds, four shillings and fourpence, in addition to the aforesaid sum of two hundred and sixty-five pounds, one shilling and threepence, was considered seriatim ; after which consideration, and with a full knowledge on the part of each and every such parishioner, that such rate was to be applied to the liquidation of such outstanding demands, as well as to the expenditure of the current year, it was moved and carried by a great majority of such parishioners, thirty-one being for and five against it (the rest of the parishioners having then either left the vestry, or declined voting on the said motion either way), that the said rate should be raised, the said William Farlar continuing to be, and being present at and in such vestry when it was so moved and so carried.

Fifth.—That the ordinary expenditure of the three places of worship, in the said parish of Saint Mary Abbots, Kensington, to wit:—the Old Church, the Church of the Holy Trinity, and that of Saint Barnabas (exclusive of charges for repairs and other

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extras, to be provided for extra, from time to time, as occasion may require), payable out of the church rates of the said parish, is five hundred and eighty pounds, less, by burial fees, about one hundred and sixty pounds, but plus the sum of four hundred pounds (at present) payable from the church rates in annuities to certain persons, who in the year one thousand eight hundred and thirteen, lent or advanced to the said parish, the sum of five thousand pounds on such annuities, for the purpose of providing an additional burial ground for the said parish, in virtue and under the authority of a special act of parliament made and passed in the thirty-third year of his late Majesty King George the Third; and the party proponent doth further expressly allege and propound, that taking the rental of the said parish at ninety-two thousand six hundred pounds (but which it considerably exceeds), every penny rate will produce (even after allowing for defaulters and charges of collection), a net sum of three hundred and forty-seven pounds, five shillings, being much more than sufficient to discharge all outstanding demands against the said parish, at the time when the rate sued for in this cause was raised, with the exception of the sum of two hundred and sixty pounds, one shilling and threepence, due from the church rates to the trustees of the poor of the parish as aforesaid.

Sixth.—That all and singular the premises were and are true, public and notorious, and so forth.

DR. LUSHINGTON.

The present question is one of great importance, but the subject having been of late years much discussed, and being familiar to us all, I will not delay giving my opinion.

I am aware of the difficulties which exist in regard to church rates, if however I am satisfied as to the law which would be applied to the case in the Courts at Westminster, it is my duty to submit to that law.

The Churchwardens before expending any money, should make an estimate of the expenses intended to be incurred, and then propose a rate; this unquestionably is the legal, most safe, and most convenient mode, although I do not mean to say that it is the only one.

Two objections were taken by Mr. Farlar, to the rate in this case; first, that it was an unequal rate, and secondly, that it was retrospective.

First.—The first objection is attempted to be met by the first Article of the allegation now before the Court; that Article recites the defendant's plea, "that about three hundred and sixty persons who have been rated to the poor, are omitted to be rated in this church rate," and in reply to that, it states, that by local acts of 17 Geo. 3, and 7 Geo. 4, the landlords of all houses, of which the annual value does not exceed twenty pounds, (and not the occupiers) are made liable to be assessed to the poor rate, and that two hundred and seventy of the persons so omitted, are landlords rateable to the poor under those acts.

There is no reason, certainly, why the landlords should be assessed; the act of parliament being

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Semble, that all rateable property should be assessed to the church, although payment of the rate may not be enforced against those who are in a state of pauperism.

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silent as to church rates, the occupiers, and not the landlords are rateable. The Article goes on to plead, that a custom exists in this parish, not to assess the occupiers of those houses, of which the landlords are rated to the poor under the above acts, by reason that from their indigence, no payment could reasonably be expected. So that houses of the annual value of twenty pounds are not rated at all, and consequently, property to the extent of three or four thousand pounds per annum, is entirely exempted from the payment of church rate. No case, or authority, or principle, has been stated in support of such a system. I am of opinion, that it is not the duty of Churchwardens to exact payment from those who are actually in a state of pauperism, and that other parishioners could not on that ground refuse to pay their rates: it is further stated, that about seventy others are omitted to be rated, on account of their exigency, some of them receiving parochial relief; *but the law requires that all the property should be rated*; it is with reluctance that I make these observations, as usage becomes in some degree consecrated by time, but sitting here as a judge, it is my duty to state my opinion of the illegality of such a practice.

A church rate made on Lady day to cover expenses from the preceding Lady day, bad.

Churchwardens (by the general law) cannot borrow money on the security of future church rates.

Second.—The Court read the second Article (a) and proceeded, “this custom is altogether illegal, and the Churchwardens had no right to borrow the money.”

Third and Fourth.—The third Article states in substance, that at the time of making the rate, in round numbers, five hundred out of fourteen

(a) See the second Article, page 358.

hundred pounds, were for purposes retrospective : the *fourth* pleads, that the vestry was an open vestry, and that the whole matter was fully discussed. But it is admitted that the rate is a retrospective rate, to the extent of more than one-third of the whole amount, though not on the face of it, and the question is whether or not such a rate, under the explanations given in this allegation, can or cannot be enforced by the authority of this Court. If I entertained any reasonable doubt as to what the law is, I should certainly consider it my duty, to give the Churchwardens the benefit of that doubt, and, by admitting the allegation, leave them to proceed as they might be advised. But, if on the other hand, the law is clear, and laid down by high authorities who have decided the point, I apprehend I am bound in duty to bow to those authorities, and to pronounce against the admission of this allegation. It is not disputed that a rate, on the face of it retrospective, is vicious ; it has been settled by repeated decisions in the Court of King's Bench, and the Court of Chancery, (a) that such a rate cannot be enforced. I am aware that my predecessor, Sir Christopher Robinson, in 1812, in the *Spitalfield's case*, on the authority of a case before Sir George Hay in 1770, rejected an allegation of a defendant resisting a church rate, on the ground that it was retrospective for one year : but the parties in that case, in consequence of the difficulties which occurred, declined proceeding further in the cause. Had the sums in the present case been of small amount, I should have

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A church rate not on the face of it retrospective, but intended for retrospective purposes, to more than a third of its amount, invalid.

(a) Page 355, note (a).

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felt myself justified in leaving them entirely out of consideration; but it cannot be said that the sums admitted to be retrospective, are trivial or unimportant. How stands the case then? I cannot say that any case has yet been decided, which expressly and directly governs the present case; but I cannot, on principle, comprehend that there is any real distinction between the case of a rate, on the face of it retrospective, and a rate intended to cover debts, or parts of a debt previously incurred. It appears to me to be a distinction without any foundation, and that the cases are without any real difference. Can it be maintained that this Court is bound to set aside a church rate, where the party making it, had avowed an illegal object on the face of it, and to give force and effect to a rate, where the object, though not avowed, was equally clear and illegal? I am very clearly of opinion, that if such distinction were attempted in a court of law, it would not be admitted. For the consequence would be absurd; it would be in the power of any vestry, by shaping the heading of the rate, to suit their own purposes, to violate the law at their own pleasure, and to any extent. I think that all the principles laid down by the Court of King's Bench, (a) and by the Vice Chancellor, in the case of *Lanchester against Thompson*, (b) are equally applicable to rates admitted to be retrospective, and those which are retrospective on the face of them.

The Court rejected the Allegation

(a) See note (a), page 355.

(b) 5 Madd. page 4.

From this decision an appeal was presented to the Arches Court of Canterbury, and on the 30th May, 1837, judgment was given in that Court. (a)

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The question is whether this allegation contains matter proper to be brought to the notice of the Court, for its information, before it pronounces its opinion upon the points submitted for its decision. In my opinion this allegation does contain matter of that description; for unless it has been already decided that under no possible circumstances a rate retrospective in its character can be sustained, the Court ought not to determine the point of law, until it is in possession of all the facts and circumstances of the case.

The libel admitted in the Court below, pleaded the due making of the rate in June, 1833. An allegation by way of defence was also admitted on behalf of Mr. Farlar, setting up two grounds of objection to the validity of the rate; first, that it was partial and unequal; persons having been omitted to be rated to the repair of the church, who had been assessed to the poor rate; and, secondly, that the rate was intended to be applied to the discharge of arrears of debt, as well as to current expenses, and that it was to that extent retrospective.

The allegation now offered is in reply to Mr. Farlar's plea.

On the first ground of objection to the rate,—

(a) This case in the Arches Court, and the following cases of *Veley and Joslin v. Burder*, and *Gaudern v. Selby*, are here reported, although out of order as to date, as being more convenient for reference.

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that it was partial and unequal—explanations are given and reasons assigned why names had been omitted in the assessment for the repair of the church, which had been inserted in that for the relief of the poor, namely, that by a special Act of Parliament, the poor rates of houses under a certain rental are paid, not by the occupiers, but by the landlords; in other instances, that the parties were approaching to, or actually in a state of pauperism, receiving parochial relief; can it be said that these are not fair explanations fit to be *proved* in order to enable the Court to decide on the validity of the grounds assigned for omitting the names?

With respect to the second objection—that the rate was intended to be applied to the discharge of arrears of debt incurred by former churchwardens, and to current expenses, and that it is to that extent retrospective, circumstances are also pleaded in this allegation, explanatory and contradictory of Mr. Farlar's plea; and the sole question now before the Court is, whether the facts and circumstances stated in this allegation are such as, if proved, might have an effect upon the judgment of the Court: this not being an abstract question, whether a rate on the face of it retrospective be invalid, but whether this rate, under all the circumstances stated might be supported and enforced.

It has been argued, that under no circumstances can an expenditure incurred in a preceding year be defrayed out of a rate for the current year.

Now if the Court had been referred to any case in which such a rule had been expressly decided

in a court of law, I should have been inclined to bow to such decision, although matters of church rate being undoubtedly of ecclesiastical cognizance, this Court might possibly consider itself at liberty in a question of this kind, where not restrained by actual prohibition to govern itself according to the ecclesiastical law as administered in these Courts; but the Court has been referred to no such decision. The cases cited from the common law reports were attempts to enforce by *mandamus* or otherwise the *making* of rates to reimburse churchwardens.

In the case cited of *The King v. The Chapelwardens of Bradford*, (a) Lord Ellenborough indeed observed, that the difficulty of making the rate before incurring the expenditure had been got over sometimes by an “evasion;” but the only point *decided* in that case was, that a *mandamus* would not lie to compel the *making* of a rate to reimburse churchwardens.

So in the cases growing out of the *Bury St. Edmunds case*, there has been no direct decision on this point, although it cannot be denied that the learned judges in those cases strongly inclined to hold the law to be that no retrospective rate could be good.

It has been argued that in all cases, an estimate of the expenditure should be made before the rate is applied for, but this cannot always be done; suppose the church was broken open, and the articles necessary for the performance of Divine service—the Bible and prayer books—should be

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(a) 12 East. Rep. 566.

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stolen, how could Divine Service be performed if the churchwardens could not advance money out of their own funds? Unless they have such power, the church must be closed, as they cannot get a rate without a legal notice. I *purposely* put this as an extreme case, because it was argued as one of the grounds of the objection to this rate, that there was a charge for faggots, (for warming the church) which had been purchased before the rate was granted.

In the absence then of direct decisions on the point in courts of law and equity, it will be proper to see what has been done in these Courts, and it should seem that in former times it was not held here that a church rate was bad because it covered some items of expenditure which were incurred in a preceding year. In the case referred to by the King's Advocate, (a) the rate, though in part retrospective had not been objected to on that ground, either in the Consistory Court or in the Court of Arches, although there were eminent counsel in those Courts who would have taken the objection had it been considered a tenable one; nor did either of the judges of those Courts deem it an objection to the rate, that it was made in 1758 to meet expenses incurred in 1757.

In the present case whatever was done, was done with the full knowledge of the vestry, not a select, but an open vestry duly assembled, at which seventy persons attended: the whole accounts were laid before them, and the rate granted with the full knowledge of all the facts, and of the purposes to which the rate was intended to be applied.

(a) 2 Lee's Cases, 549.

Without, then, taking upon myself to decide at the present moment whether this rate can eventually be supported or not; I am of opinion that the facts are proper to be laid before the Court for its information, and therefore that the allegation ought to be admitted; I accordingly pronounce for the Appeal, reverse the sentence of the Court below, and admit the allegation.

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From this decision Mr. Farlar appealed to the Privy Council, and on the 30th of June, 1838, the judgment of the Arches Court was reversed by the judicial committee, by the rejection of all the Articles except the first.

Present—

The Right Hon. Mr. Baron PARKE.

Mr. Justice BOSANQUET.

Sir John NICHOLL, Judge of the
High Court of Admiralty.

Thomas ERSKINE, Chief Judge
in Bankruptcy.

Their Lordships were of opinion that that part of the allegation, (the first Article), which states the reasons for omitting the names of certain parishioners in the assessment was admissible; they therefore, directed that part of the allegation to be admitted; but they were of opinion that the remainder of the allegation was properly rejected by the Consistory Court on the other ground: they therefore so far reversed the sentence of the Arches Court and remitted the cause.

CONSISTORY COURT OF LONDON.

VELEY and JOSLIN against BURDER.

On admission of the Libel.

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MICHAELMAS
TERM,
Nov. 15th.
2nd Session.

This was a question as to the admissibility of a libel in a suit for subtraction of church rate promoted by Augustus Charles Veley and Thomas Joslin, the churchwardens of the parish of Braintree, in Essex, against Joseph Davey Burder, a parishioner.

The libel pleaded in substance.—That the church being in need of necessary repairs, not having been substantially or sufficiently repaired for several years, the parishioners assembled in vestry on the 2nd of June, 1837, pursuant to public notice duly given, for the purpose of making a rate for the repairs of the church: that an estimate of the necessary repairs was produced, that the necessity for such repairs was not disputed nor any objection taken to the amount of the estimate; that a rate of three shillings in the pound was then proposed; but that an amendment was put and carried, that the consideration of a church rate be postponed to that day twelve months.

That after the said amendment had been carried, and the parishioners and inhabitants had thereby refused to make or grant a rate, the said churchwardens did on the 10th day of the said month of June, *rate and tax all and every the inhabitants and parishioners*

of the parish aforesaid, for, and towards the necessary repairs of the church of the said parish, and the other expenses necessarily and legally incident to the office of the Churchwardens of the same parish for the remainder of their year of office, at the rate of three shillings in the pound, on the annual value of all messuages, lands, and tenements occupied within the said parish, &c.

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This libel was opposed.

Addams, on behalf of Mr. Burder, did not object to the form of the libel. He admitted, for the sake of argument, that the church was out of repair, and that the inhabitants had refused a rate; the question for the Court was, whether the step which the Churchwardens had taken in consequence was a legal step.

The heading of the rate set forth, that at a meeting of the parishioners on the 2d of June, 1837, continued by adjournment to the 5th of September, assembled in pursuance of a notice duly given, for the purpose of granting a rate for the necessary repairs of the church, and for other expenses incidental to the office of Churchwarden, the majority of the parishioners refused to make or grant a rate, by postponing its consideration for twelve months, and that Messrs. Veley and Joslin did, on the 10th of June, make and levy a rate of three shillings in the pound. So that it appeared on the face of the paper that the Churchwardens had made this rate on their own authority, and they now called upon the Court to enforce it.

Two theories had been proposed in discussing this subject; and according as one or the other was adopted, different views were to be taken of the

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TERM,
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question. One theory was this, that it is absolutely imperative on the parishioners to repair the parish church. The other was, that it was not absolutely imperative, but imperative *sub modo*; viz. if the parishioners chose to assemble and make a rate, in which case it was binding on dissentients, and could be enforced under the statute *circumspecte agatis*. In support of the last doctrine, it was said that a parish was a corporation for this purpose; and if the majority were willing that a rate should be raised, it would be enforced against dissentients, but not otherwise.

In arguing this case, he should assume that it was absolutely imperative on a parish to repair the church. It was obvious that unless it was absolutely imperative, and a parish was bound to repair the church *nolens volens*, the present suit could not be maintained. In arguing the case on this assumption, he made no concession; he did not admit or deny the proposition, he had nothing to do with it; but on the assumption that it was absolutely imperative, he should contend that the present rate was insupportable.

The obligation of a parish to repair the church being assumed, how was it to be enforced? Suppose a parish to be refractory and unwilling to rate themselves, how were the repairs of the church to be enforced; It was said that the proceedings in the Ecclesiastical Courts were of two kinds:—*first*, civil, by Monition; *second*, criminal, by Articles. This was a distinction, as it appeared to him, without a difference: the civil proceeding resolved itself into a criminal one, for the monition brought the party within the criminal jurisdiction So that it

was a criminal proceeding, the Court being limited to spiritual censures only.

First, then, these Courts had no compulsory process to enforce a church rate other than by spiritual censure. He had looked into the books, and could find no case which had the slightest reference to any means of enforcement which these Courts possessed other than by mere spiritual censures. This was the doctrine held by the earliest text writers of any authority. Lindwood cites Archbishop Reynolds:—"We enjoin the archdeacons and their officials, that in the visitation of churches they have a diligent regard to the fabric of the church, and especially of the chancel, to see if they want repair; and if they find any defects of that kind, they shall limit a certain time, under a penalty, within which they shall be repaired." Under the word "penalty," Lindwood says, "Where the penalty is not limited, the same is arbitrary; but this cannot intend here the penalty of excommunication, inasmuch as it concerneth the parishioners *ut universos*, as a body or whole society, who are bound to the fabric of the body of the church. Yet the archdeacon, if the defect be enormous, may enjoin a penalty, that after the limited time shall be expired, Divine Service shall not be performed in the church until competent reparation be made; so that the parishioners may be punished by suspension or interdict of the place. But if there are any particular persons who are bound to contribute towards the repair, and although they are able, are not willing, or do neglect the same, such persons may be compelled by a monition, to such contribution under pain of excommunication;

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that so the church may not continue for a long time unrepaid through their default." Lindwood, therefore, mentions no other compulsory process than spiritual censures, in order to enforce the repairs; and the statute itself of *circumspecte agatis* seems to limit the Court to ecclesiastical censures. This doctrine has been recognised and referred to in cases in courts of common law. (a)

In any of the text writers (Gibson, Watson, and others), he (*Dr. Addams*) could not find that the repairs of a church could be enforced otherwise than by ecclesiastical censures; in what way he did not trouble himself with. It might be said that the remedy was highly inconvenient, and he admitted it might be so; it might be impracticable, though he was not called upon to say so, or that it was obsolete, for he found that within the last year or two it had been held, in the Court of Delegates, not to be obsolete. In *Greenwood v. Greaves*, (b) instituted in the Consistory Court of York, and appealed to the Court of Delegates, it had been said by the Court, that "if the parishioners were contumacious and obstinate, and pertinaciously refused to make a rate collusively, it might be a ground for proceeding against them, though such a state of things was not alleged in that case." But admitting that the remedy was even impracticable, it was the only legal remedy; and though a legal remedy might be inconvenient, that did not justify parties in resorting to an illegal remedy, or the Court in allowing it.

(a) *Rogers v. Davenant*, 1 Mod. Rep. 195, 236. 2 Mod. Rep. 8. *Blank v. Newcomb*, Holt, 594.

(b) 4 Hagg. Ecc. Rep. 77.

Perhaps, however, it might be said in this case, that the Court was not asked to enforce the repairs of the church ; all that it was asked to do, was, to compel a dissenting parishioner to pay a church rate ; now, if the Court was of opinion that this was a church rate, the libel was admissible, and the proceedings must go on. But the question was, is this a church rate or not? He, (*Dr. Addams*) denied that it was a church rate on the face of it. What was the definition of a church rate? A church rate was a rate made not by the Churchwardens only, but by the Churchwardens and parishioners. That could not be quarrelled with as a definition of a church rate. This was the first instance of a church rate (excepting a supposed case in the Court of Arches, in 1799) in the present form. The heading always ran—"We, the Churchwardens and other parishioners;" so that the consent of the other parishioners was necessary to the validity of a church rate, at least under ordinary circumstances. Unless the consent of the majority of the parishioners be obtained, how could a rate be called a church rate? Then the only question was, is this a rule which admits of no exception?

It had been suggested that there were two exceptions ; one, where the parishioners, being duly summoned, shall refuse or neglect to meet for the purpose of making a rate ; then the Churchwardens, according to reason, to principle, and to recorded cases, are competent to make a rate themselves. That he (*Dr. Addams*) allowed. But the other exception contended for, was, where the parishioners did not refuse or neglect to meet, but did meet, and when met refused to make a rate ; and if it be

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maintained that, in that case, the Churchwardens were competent to make a rate, he denied the proposition *in toto*. That was the present case. This was not a case where the parishioners set up that there had not been due and legal notice, or that the church did not stand in need of repair, but that they pertinaciously, wilfully, and of malice aforethought, refused a rate; he admitted this for the sake of argument; and the question was, whether under these circumstances it was competent for the Churchwardens to make a rate themselves, and for the Court to enforce it?

Was it not obvious that the whole current of cases in which there was a trace of church rate went to negative the Churchwardens having such power? He had admitted that the remedy, which he contended to be the only legal remedy, was inconvenient. A century and a half ago, the Bishops and the Ecclesiastical Court had attempted to obviate it in this way:—the Bishops and the Chancellors of their Courts issued a commission, empowering commissioners to tax parishes. But there were several cases in the books in which such a mode was held to be illegal—“*Rogers v. Davenant*,” already cited, in which the Court of King’s Bench granted a prohibition. Could it be supposed, when the inconvenience of the remedy was felt, and the mode of obviating it was tried, that if the Churchwardens alone had the power to make a rate, this experiment would not have been resorted to? The better way would be, to proceed against the Churchwardens; and the Churchwardens might return that the parish would not raise the funds for the repairs of the church. The Court would then absolve them, or not absolve

them, by saying they might make a rate themselves. Would not the courts of common law grant a prohibition in the latter case? Lindwood, in the passage already cited, had considered this very case, and how did he lay down the law? "If the Churchwardens came in, and showed that they were not to blame, they would be exonerated." If Churchwardens could raise a fund by their own authority, it must be their own particular personal fault that a church was not repaired.

Was there any case the other way that was an authority? He did not refer to Viner and Bacon. The single case, or supposed case, to contravene the doctrine was an anonymous case, 1 Ventris, 367, in 1684. That was a motion for a prohibition to the Ecclesiastical Court, in respect to a rate, which it was suggested had not been made with the consent of the parishioners; and the Court said, that "if the Churchwardens duly summoned the parishioners, and they refused to meet or make a rate, the Churchwardens might make one alone, for the repairs of the church, if needful, because the Churchwardens would be the parties liable to be cited." The whole difficulty of the case arose from an error in a single letter, because if, instead of "or" make a rate, we read "to" make a rate, it would be perfectly reconcileable with the doctrine laid down in other cases; and the text writers who followed that case so understood it, and cited it as an authority.

It has been said, that Bishop Gibson had adopted the case of Ventris as it stood; but this was an error. The only passage in Gibson which referred to this point was p. 1196, where he laid it down, that the

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parishioners are to be summoned, and if none appear, the Churchwardens alone may make a rate, because they are to be cited, and punished for neglect of repairing the church ; and amongst the authorities cited for this is, 1 Ventris, 367. Gibson therefore, did not say, that if the parishioners, being summoned, shall meet and refuse a rate, it is competent to the Churchwardens to make one. One of the greatest and most learned men ever known in this country, Prideaux, whose book, published in 1701, and which is a model for all such works, contains express directions for Churchwardens to prevent the inconveniences resulting from their errors and ignorance, and which refers expressly to the repairs of the church and church rates, states, (sect. 52, p. 55) that the Churchwardens are to survey the repairs, and levy an equal rate on the parish to defray them ; and that the rate must be made “ with the consent of the major part of the parishioners ;” that the Churchwardens are to call a meeting of the parishioners, when whatever rate is made with the consent of the major part who come to the meeting will be a good and legal rate ; or the rate may be made by the Churchwardens alone, if, on calling a meeting, the parishioners shall not come. Amongst the cases cited here again as authorities for this, is 1 Ventris, 367.

But there was one case, supposed to be decided by Sir W. Wynne, in 1799, in the Arches’ Court, which excited his astonishment. If there was no mistake in that case, he (*Dr. Addams*) was sorry it had been brought forward ; for a case of a more startling description he never met with. The case which had been taken from a manuscript note by

Dr. Arnold, was "*Gaudern v. Selby*," brought by appeal from the Court of Peterborough. A Churchwarden had expended money on his own credit, and called on the vestry for a rate to reimburse him, and they refused it, and he thereupon levied a rate on his own authority; the judge in the Court below pronounced the rate a valid one, and Sir W. Wynne affirmed the judgment and condemned the defendant in the costs.

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Dr. Lushington.—In the Court below there was no allegation given in at all. On being brought up by appeal, an allegation was given in, which was signed by Lord Stowell (then Sir W. Scott); it passed without debate, and on that plea and the evidence of four witnesses Sir W. Wynne decided the case.

Addams.—The church had been repaired out of the Churchwardens' own funds; the libel was false in that case. Yet the judge affirmed the sentence, and condemned the party in the costs. Sir W. Wynne, according to the note of Dr. Arnold, laid it down broadly and distinctly, that where a parish refused to make a rate, the Churchwardens were entitled to make one on their own authority. Nobody had ever heard of this case before. The report of the Ecclesiastical Commissioners showed that they did not know of the case, or had forgotten it.

Dr. Lushington.—A most extraordinary circumstance attending that case is, that the citation is dated before the rate was made: and it was a citation to appear both in the Archdeacon's Court and in the Bishop's Court.

Addams.—If the Court feels itself bound by that case, it must of course admit the libel; but for that

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case the Court could have no hesitation in holding that however inconvenient the remedy of the compulsory process of the Court may be, and whatever advantage might attend the investing Churchwardens with this power, the Court cannot recognize it, and the rate in this case, so called, is only a pretended rate. In conclusion, he submitted to the Court that, even if it were a matter of obligation on a parish to repair the church, this was not an admissible libel and the suit must be stopped *in limine*.

The Queen's Advocate, in support of the libel, said he should not enter into the question of the policy or impolicy of church rates; the Court had to determine only a mere question of law,—namely, had Churchwardens, where parishioners had met and refused to make a rate, for the necessary repairs of the church, a right to make a rate, or had they not? Dr. Addams had said that the question branched out into two separate points,—first, as to the liability of a parish to repair the body of the church, which he did not admit there was any obligation upon them to do, though he did not argue that point; but his learned friend would find it difficult to support the contrary proposition. At whatever time this obligation was adopted in England, certain it is, that by the law and custom of the realm, which are synonymous and convertible terms, a parish was bound to support the fabric of the church, that is, the body of the church, though not the chancel, the repairs of which devolved upon the parson. The case in Lord Holt proved this, and it was so laid down by Lord Coke. Then, as to the manner of making the rate, that is, the power of the Churchwardens to do

so, in case the parish refused. Dr. Addams said that no text-writer, except Viner and Bacon, laid it down that Churchwardens had the power of making a rate in such circumstances, and that there was no other authority than the case in *Ventris*. Degge, in his *Parson's Counsellor*, a book of considerable authority, and cited as an authority of the highest order, in p. 204, (ed. 1820), said that if the parishioners who came to a meeting duly summoned to make a rate, refused or neglected to agree to such an assessment, or refused to meet, "I conceive," he said, "that the Churchwardens, showing just cause, may make the assessment alone." Now it was admitted that this was such a case. The church was out of repair, and the Churchwardens were in want of funds to pay for the repairs. Degge does, indeed, intimate that others had doubts on the point, "but some are of opinion," he says, "that the Churchwardens cannot proceed alone, but must compel the parishioners by Ecclesiastical censure;" and he refers to *Mod. Rep.* and the case in *Ventris*. The conclusion, however, to which he arrived is, that Churchwardens have a right to make a rate if the parish refused to do so. The passage in "*Rogers v. Davenant*," was a mere *obiter dictum*: nothing was done upon the case, and it did not negative the right of the Churchwardens. That case went merely to say, that a Bishop cannot appoint a commission to levy a rate to "re-edify" the church. It was said, in that case, that the Spiritual Court may proceed against such parishes as are obstinate and refuse to repair the church, by excommunication; "but they may be also liable to pay the rate set by the *Churchwardens*," not the

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Churchwardens and other parishioners. The fair construction of this was, that if the parish refuse to make a rate, the Churchwardens may, and libel for it in the Spiritual Court. Of the case of "*Pense or Pierce v. Prowse*," there are three reports; Lord Raymond's is the fullest. The prohibition in that case went on the ground that the rate was a mixed rate, for the chancel as well as the church, so that the proportion for which the parishioners were legally liable could not be ascertained. The case in Ventris was the most important on the question, and Dr. Addams could not get out of it but by altering the text. It was a motion for a prohibition, on the ground that the rate had been made without consent of the parishioners. The Court said, that the Churchwardens, if the parishioners were summoned and refused to meet, "or" to make a rate, might make one alone for the repairs of the church, if needful; because, if the repairs were neglected they would be cited, and not the parishioners; and a day was given to show cause why the Court should grant a prohibition. But nothing followed. This case had never been upset, and all the other cases were consistent with it. If a parish duly meet and refuse a rate, or if they refuse to meet, the evil is the same, and the remedy ought to be the same. Viner says, "If the parishioners be summoned and refuse to meet "or" to make a rate for the repairs of the church, the Churchwardens may make a rate alone, if needful; because if the repairs are neglected, the Churchwardens are cited, and not the parishioners;" and a reference is made to 1 Ventris, 367. Bacon says, "But if the Churchwardens give the parishioners due notice, and they refuse to

come, “or” being assembled, refuse to make any rate, the Churchwardens may make a rate without their concurrence.” With respect to the case of “*Gaudern v. Selby*,” there certainly appeared to be anomalies in that case, it being a rate to reimburse, for example. But in 1799 the strictness introduced by the courts of Common Law on this point was not known. If the learned judge was wrong on that point, it did not follow that he was wrong on another. He was one of the most eminent judges in the Ecclesiastical Courts, whose decisions were looked up to with great respect; and whatever irregularity there might be in that case in the Court below, he did decide on principle, that Churchwardens were bound to see to the necessary repairs of the church; and if the parishioners would not make a rate, the Churchwardens alone had a right to do it. The Court of Arches, therefore, had decided the question on Appeal, and this Court was bound to follow the law as laid down by the superior Court, whatever its own private opinion might be. In conformity, therefore, with the decision of the Court of Arches, this Court was bound to admit the libel.

Nicholl, on the same side, The adjournment of a rate for a twelvemonth (which a former vestry had also done) is in the eye of the law a positive refusal of a rate; and the Churchwardens, being bound by law to keep the church in repair, had made a rate themselves. It may be assumed that a parish is under a legal liability to repair the church. Then, if the parish neglected this duty, what was the remedy? The Court would bear in mind the object to be attained—namely, the sustentation

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of the fabric of the church, not the punishment of an individual for not doing it. If it was obligatory on a parish to repair the church, and if the Court could only order a parish to meet and make a rate, they might defeat the object by their obstinacy. When it was doubtful what the law was, one had a right to argue from the inconvenience which would arise, if such and such were the state of the law; where the question then, is, whether it is the law, that Churchwardens can make a rate upon the refusal of the Vestry, it may be argued, that from reason it may be supposed that such right does exist, because great inconvenience would result from the contrary proposition. We do not deny that in the first instance, the Churchwardens are bound to summon the vestry, and the vestry have a right to consider the estimates laid before them, and whether the amount to be raised ought to be raised immediately, or in one or more sums, and if they fairly go into the question, and exercise a proper discretion on the subject, they may reject the rate. But in a case of necessity, where a rate for the repairs of the Church is refused by the vestry, the Churchwardens are justified in making a rate, and this Court would sustain it. The power of Churchwardens is limited within the narrowest bounds; they must establish the necessity of the expenses before the Court. It was admitted that Churchwardens were not bound to expend their own money; if so, and if they are liable to punishment for not repairing the Church (as held by Lord Stowell in the

Tharted case) (a) they must have some means of raising the money, and that was given to them by the power contended for. The opinion of Degge was favourable to this doctrine; Watson, Bacon, and Viner laid down the law as in the case reported in *Ventris*, and the very point had been expressly decided by Sir William Wynne in the case of *Gaudern v. Selby*.

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DR. LUSHINGTON.

The question which is submitted to the consideration of the Court, is one of very great importance, and I should undoubtedly take time to consider the determination which I ought to come to, were it not for the intervention of circumstances in this case which appear to me to render such delay unnecessary, and being unnecessary, the sooner I deliver my judgment the better.

The Parish-
ioners in vestry
assembled,
having refused
to make a
church rate for
necessary re-
pairs, the
Churchwardens
may of their
own authority
make such rate.

It is not necessary to enter into the details of the proceedings which have taken place; a very few words will explain sufficiently the point of law that arises.

It appears, that the Churchwardens of the parish of Braintree summoned a vestry meeting for the purpose of having a church rate made, that the parishioners met, and that a large majority of the vestry did not make the church rate, but, on the contrary, postponed the consideration of it for twelve months. I have no hesitation in saying that in my judgment, the postponement of a church rate for twelve months, was, under the

(a) *Maynard v. Brand and Philpot*, 3 Phill. 501

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circumstances of the present case, equivalent to a total rejection. In consequence of this refusal the Churchwardens thought fit to make a rate upon their own authority, and to rate and tax the parishioners of the parish "*towards the necessary repairs of the Church of the said parish, and the other expences necessarily and legally incident to the office of Churchwardens of the said parish for the remainder of their year of office, the several sums of money hereunder mentioned, being a rate or assessment of three shillings in the pound, on the annual value of all messuages, lands, and tenements occupied within the said parish.*" Some of the parishioners having refused to pay the rate, proceedings have been instituted in the Court which has properly jurisdiction over the subject, in order to enforce payment, and as all the facts and circumstances are fully stated in the libel, it is unnecessary for me to enter into further detail. Upon these facts a great and important question of law arises, namely, whether the Churchwardens have the power and authority to make an assessment upon the parish in the nature of a church rate, and for the purposes mentioned, a vestry having assembled in pursuance of due notice and refused to make such a rate?

It is not a little singular, that a question of this very great importance should come to be decided in the year 1837. One would naturally have supposed that in the lapse of so many years since the Reformation, there would have been some instance in which church rates had been refused by the parish, and made and enforced by the Churchwardens, if they had the power to do so,

and some decisions upon the point. But with the exception of a case hereafter to be noticed, it does not appear that in these courts, that point has ever been directly put in issue, or directly determined. In the first instance then, it becomes my duty to inquire, whether or not that case of *Gaudern and Selby* is a binding authority, because, if it be a stringent authority, the jurisdiction of the Court in which it was pronounced, will certainly make me consider it to be no part of my duty to enter into an examination of the merits of the case; for whatever might be the conclusion to which I might in my own mind come, I should feel myself bound by authority to pronounce one and only one judgment.

This leads me, before I examine the particular merits of the present case, to inquire a little into the rules and principles on which precedents are binding. I apprehend, that where Courts have co-ordinate jurisdiction, that is to say, where decisions are pronounced by Judges professing the same degree of jurisdiction, a single precedent might or might not be binding, according to the peculiar circumstances of the case; it ought to be binding where it was acquiesced in for a series of years, and where it was considered as a good and valid authority by other Judges, whose opinions were entitled to weight; on the other hand, I apprehend that a single decision, if unknown, and unsanctioned from the time of its being pronounced, is open to be considered upon principle by a co-ordinate Court, whether it be a right or wrong decision, not to be hastily overruled, but to be considered whether or not it is consistent with that which

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has been laid down by other Judges. But in the case of a precedent laid down by a superior court, other considerations necessarily arise. I apprehend that an inferior court cannot, of its own authority, reject the precedents repeatedly laid down by a superior court. There might indeed be some very peculiar circumstances under which an inferior court would feel it a part of its duty to investigate the question with considerable care; looking for instance, at the very highest authority, the House of Lords, that had not on all occasions been held as altogether binding, but that was under circumstances so totally different, that it is not necessary to advert to them, but without some very peculiar circumstances, such precedents would undoubtedly be binding.

I apprehend, that obedience to a superior court is one of the first duties that an inferior Judge has to perform, as the presumption of law is, that the Judge of the superior court is not only superior in rank and station, but in judgment also, and ability; and the evil which would arise from uncertainty, if any Judge were to allow himself to be let loose from precedents, and to give his judgment according to his own impression of each individual case, would overwhelm and be destructive of the best interests of the people, for the great interest of the people, is, that the law should be certain, and that all should know by what rules they should govern themselves. Upon these principles I have always endeavoured to regulate my conduct, even under circumstances where my own private opinion might have led me to a different result.

The first question, then, which I have to deter-

mine, is whether there is a precedent here or not, and this is a very important question. To form a precedent, certain things must unite; in the first place, the actual point must have arisen, and if it is to govern the present case, it must stand with it (to use a common expression) on all fours. The point must have been directly decided, and that decision must not have been overruled by any subsequent decision. These I apprehend, are the rules and principles which should render precedents binding. The present question then is whether the case of *Gaudern v. Selby* is a precedent or not? That case came with the appearance of surprise upon the whole profession. It was not known to the Ecclesiastical Commissioners, or at least it was not recollected by any of the members of the commission; and during the thirty years that I have been in this Court I never heard the case adverted to, nor was I aware that there was such a case in existence, till very lately. But it is obvious that this does not destroy its force, if upon examination it be found clothed with the other qualities which constitute a precedent. The case was decided by a very learned and accurate judge, Sir William Wynne, on the 25th of February, 1799, he being then Dean of the Arches Court. There were no reports of Ecclesiastical Cases published in those days, but there were two notes taken of the case by Dr. Arnold and Sir Christopher Robinson, both accurate note takers, and the notes of both are substantially alike. As to the case itself, it is certainly one in which, not to use too strong a term, there appears to be a great deal of eccentricity. The citation was dated

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the 17th of April, (a) 1794, the party appeared on the 28th of May, and the rate was stated to have been made on the 11th of May. There must, therefore, have been some mistake either in the month or the year, but which it was, I cannot undertake to say. The libel alleged that due notice had been given, and that the rate had been made with consent of the majority of the parishioners; but it was proved in the evidence, that so far from this being the case, the majority had disallowed the rate. Upon this state of the case the judgment was pronounced. The learned judge did not advert to any authorities: he said he was of opinion that the repairs were necessary, and that as the vestry had been called upon to make an assessment for defraying the expence of these repairs, and had refused to do so, the Churchwardens had a right to make a rate for the purpose, themselves. This was the result of the case. The point was there distinctly put in issue, and evidence was taken of the facts, so that Sir William Wynne had not only the point of law before him, but all the facts as proved in evidence. But the point there decided was the very point upon which I have now to decide. I do not hesitate to say, that if I were a co-ordinate judge, the total absence of all authorities and precedents would have formed a matter of weighty consideration in my mind, as to whether I should have allowed my opinion to be governed by the judgment in that case. But that judgment had been

(a) This appears to have been a clerical error, the citation it seems although dated April, issued on the 17th of May, as the party is called upon by it to appear on the 28th day of *this instant May*.

deliberately pronounced by the Dean of the Arches, a superior court to that in which I am now sitting. As my judgments are liable to be submitted by appeal to the Dean of the Arches, and to be overruled by him, whose decisions constitute the law which I am bound to administer; looking at these circumstances, and at the principles I have myself laid down, I feel myself bound by the judgment pronounced in the case of *Gaudern and Selby*, and in obedience to that judgment, to admit the present libel. Whether this be good law or not, or what ought to be the law of the case, is a question upon which I do not consider myself called upon to pronounce any opinion. I may, however, observe that there are other reasons for not entering into the merits of the case, though those I have stated are satisfactory. I think, that upon a question of such great importance, and which I suppose, from what fell in the course of the argument, will be carried to another tribunal, it would be better that it should go there in no way affected by my judgment, in one way or the other.

The Court then admitted the libel.

1837.

MICHAELMAS
TERM,
Nov. 15th.
2nd Session.

VELRY
and
JOSLIN
against
BURDER.

ARCHES COURT.

GAUDERN *v.* SELBY. (a)

Appeal from Peterborough.

1799.

Feb. 25th.

A churchwarden may of his own authority make a church-rate.

Court.—This is a case commenced by citation, April, 1794, by Selby, Churchwarden for 1793-4, in the parish of Eastern Maudit, for church repairs.

The rate amounts to 31*l.* 6*s.*; at the head of that rate, Mr. Gaudern charged 9*l.* 6*s.* 0½*d.*

The libel pleads, vestry, May, 1793, and resolution of vestry for rate of 9½*d.* in the pound, and that Gaudern, at time of making this rate, occupied lands at rent of 200*l.* per annum. Suit before the Surrogate of the Archdeacon and Chancellor of Peterborough.

Decree against Gaudern, with costs of suit; from that sentence this appeal brought.

Allegation, that the repairs that were necessary might have been done for less than 31*l.*

That no notice was given in the church of vestry.

That the Article stating general concurrence untrue.

Rate generally disallowed.

Not denied that church in want of repairs.

No fraud or improper practice alleged against Churchwardens.

(a) This is a *verbatim* report from the MS. notes of the late Sir Christopher Robinson, furnished me by my friend Dr. Robinson, his son.

No inequality or unfairness alleged against the rate.

Admitted by Gaudern, that he occupied the sum mentioned, and the rate fair.

But ground that is taken, two Objections—

Repairs not such as to require 31*l.*; and, rate not made by parishioners in vestry.

With respect to first, I take that law which has been laid down,—that Churchwarden, from office, bound to keep the old edifice in repair. He cannot buy a new bell, or build gallery, or make any addition, and that he does not want authority of parishioners for those repairs any further than by their election of him to office, nor can parishioners object the repairs improvident; if they are injured, it is by the indiscretion of their own choice. They may indeed remove the Churchwarden by proper application to the Court, but they cannot refuse to indemnify him for sums actually expended in repairs, other articles of expence, wine for sacrament, sweeping of the church, attendance on visitation.

But it is said these ought to be specified. But I think the gentlemen who say so, confound two things; the minutiae of this rate, and the items of expence, which a Churchwarden must give an account of; for every sum beyond 40 shillings, a Churchwarden must produce vouchers, for 40 shillings, I believe his own oath is sufficient. If, therefore, it could be proved that after passing all his accounts and necessary deductions, the sum required, might be under 31*l.*; yet what of that? the rest would not be lost to the parish, it would remain to be transferred to his successor. No

1799.

Feb. 25th.

GAUDERN
against
SELBY.

1799.

Feb. 25th.

GAUDERN
against
SELBY

objection, therefore, could lie on that ground. But I think the evidence of the case shows the church was in want of the repairs done; commandments obliterated: these necessary to be renewed, enjoined by canons; King's arms, though these are not by canons, yet by King's proclamation, after the Restoration, to acknowledge the King's supremacy: where these had been hung up before, extremely proper they should be continued.

As to assessment, not necessary that it should *appear* by assessment that it was an equal assessment. But that not before the Court, as that makes no part of Mr. Gaudern's objection. The objection that no notice was given in the church, is utterly unfounded. They seem to have confounded two circumstances.

Vestry, to authorize Churchwardens to make repairs, not necessary. That vestry was called for purpose of making assessment is positively sworn. Mr. Byerly says he was at the vestry, and that Gaudern was there; that they offered Selby a rate of 6d. per pound, but he would not accept it. Other witnesses, Manning and Clayson, they say, they and other landholders objected to repairs as improvidently and extravagantly made. Offer of payment of part; refusal of Selby. In my opinion, Churchwarden perfectly justified in doing that. If repairs such as he was authorized to make, the offer of less than repayment, oppressive and unfair.

What is the case then?—Vestry refused to make the rate. What the law?—I do apprehend the Churchwarden has a right to make such a rate himself. He cannot do it without calling on them,

undoubtedly ; but if they refuse, if they object improvidence, no matter. If repairs have actually been made, on the refusal of parishioners to make rate, I am of opinion he may by law do it himself. It is said that Churchwardens might have proceeded against parishioners by Ecclesiastical censures to make a rate. But how is that to be done? Is the parish to be put under interdict? The Churchwarden, indeed, is sworn to his discharge of his office, and if he neglects, he may be proceeded against by Ecclesiastical censure. But that would be no remedy for him against the parishioners.

On the whole, as I think the Churchwardens have been justified in what they did, and there has been a combination against them by some individuals, for I cannot call it a parish act, I shall confirm the decree of the judge below, and condemn the appellant in the costs of the appeal.

1799.

Feb. 25th.

GAUDERN
against
SELBY.

PREROGATIVE COURT OF CANTERBURY.

SANKEY *against* LILLEY AND THE KING'S PROCTOR. (a)

This was a cause of proving in solemn form of law, the alleged last Will and Testament of Mary Decaufour, late of Grove Lane, Canterbury, spinster, deceased, bearing date the 14th November, 1834. The will was opposed by Mary Lilley, (wife of Isaac Lilley) the sole legatee, in a will of the deceased, dated the 26th June, 1826.

1836.

TRINITY TERM,
May 27th.
1st Session.

(a) On this cause coming on for hearing on a former day, the Court thought that notice should be given to the King's Proctor, as it appeared that the deceased left no known relations, and the residue under the will of the 26th June, 1826, being undisposed of, in consequence of which an appearance was given for the Crown.

1836.

TRINITY TERM,
May 27th.
1st Session.

SANKEY
against
LILLEY
AND THE
KING'S PROC-
TOR.

The deceased died on the 8th June, 1835, aged above eighty years; she left no property, except a few articles of furniture, and what she might be entitled to, on the result of a suit in Chancery, on the construction of the will of Mrs. Mary Braddon, (her niece of the half blood) to whom she was next of kin, and heiress at law.

By the will now before the Court, the deceased left two hundred pounds to the Kent and Canterbury Hospital; fifty pounds to the Lying in Charity, Canterbury; five hundred pounds to Mr. Charles Miette, and of the residue, both real and personal, she gave two-thirds to Ann Woollett, her nurse, and the remaining third to Mr. Robert Sankey, Solicitor, Canterbury, and she appointed him sole executor, and the will proceeded, "and I particularly direct, that in addition to the benefit he may derive under this my will, he shall be allowed to retain all costs, charges, and expences, which he has already, or may hereafter incur, in establishing and prosecuting my claim, as the next of kin, and heiress at law, of the said Mary Braddon, deceased, or otherwise as my attorney; and also, all monies which he may have paid, or shall pay to me, or for my use and benefit, and I declare, that notwithstanding his appointment as executor of this my will, he shall be entitled to make all usual and customary charges, as an attorney and solicitor, for any business done by him, relative to my affairs, and that in the same manner as if he had not been appointed an executor, but as acting in the character of attorney, or solicitor, to the executor of this my will." This will was propounded in

a *condidit*, on which W. P. Beecham, (a) James Clarke, and William Wood, the subscribing wit-

1836.

TRINITY TERM,
May 27th.
1st Session.

SANKEY
against
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PROCTOR.

(a) The evidence of Beecham, which is virtually the same with that of the other subscribing witnesses was to the following effect:—William Pain Beecham of Hawkhurst, in the County of Kent, attorney-at-law and solicitor, aged thirty-six years, a witness, produced and sworn on his oath, deposes and says as follows:—

To the *condidit* and the paper writing therein propounded, I did not know Mary Decaufour, the deceased, in this cause, and never saw her, till I went to her to receive instructions for the will in question. On the 14th of November in the last year, the same day as that on which the will bears date, I went to the deceased by the desire of Mr. Sankey, who is an attorney at Canterbury, and one of the devisees named in the will in question, of which he is also sole executor. I have long known Mr. Sankey—we are great friends. He sent a messenger for me, who arrived at an early hour of the 14th of November, at my house, at Hawkhurst, bringing a letter which I have with me, begging to see me at Canterbury, and saying that the messenger he had sent would bring me back. The communication between Canterbury and Hawkhurst is difficult, I ^{will} ~~saw~~ Mr. Sankey's house that afternoon. I think that on my seeing him he told me at once that he wished me to make the deceased's (the old lady's, as he called her), will for her. I knew pretty well that this was his object of my visit, for being on terms of strict intimacy with him, Mr. Sankey had told me that it was probable he should be benefited by her will; and I had then begged of him if it were so, that he would not make it himself, but send for me and I would do it; this occurred a few months or weeks, but my recollection fails me as to how long before. Mr. Sankey produced to me a paper which he said he presumed would be the old lady's instructions for her will; they were in fact in the form of a draft will, and in the handwriting of Mr. Sankey. I think that that paper has been destroyed but I am not sure; I slightly looked at it, and seeing that he was to be benefited, I told him that I had better not attend to them, but receive the instructions from the lady herself; I then, as I now best recollect, sat down at Mr. Sankey's house, and began preparing the draft of a will for the deceased agreeably to what I thought, from what I had heard Mr. Sankey say, would be the old lady's will. I am not quite clear upon that, but I think I did, I began the draft will there certainly before I went to her. I then accompanied Mr. Sankey to the deceased, whom I found a bedridden old lady, in a lodging, a mere hovel in Grove's Lane, in a wretched state of pauperism to all appearance. A nurse, and the nurse's husband were with her, in a room up one flight of stairs, and a portion of another; it was no

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nesses, had been examined—they were cross-examined on behalf of Mrs. Lilley, but no plea was given in on her part.

better than a sort of den. Mr. Sankey introduced me as the person who attended to make her will; the nurse then said to her of me, this is the gentleman; the deceased said very well. The nurse told me that the deceased was deaf, and I went and seated myself on the bed. I sat by her for about a quarter of an hour, entering into general conversation with her, previous to mentioning the subject of her will. I saw that she was of great age and very infirm; the object of that conversation was to ascertain the state of her mind; and the result of it was to satisfy me that she was competent to undertake and explain what her wishes were. I commenced it by inquiring as to the state of her health, and how long she had been confined. I then asked her as to her relations, and questioned her particularly as to Mrs. Braddon, through whom she became entitled to the property. She told me, that Mrs. Braddon was her aunt, and that she (the deceased) was the only surviving branch of her family. I asked her if there were any persons living who were her relations, such as we should term next of kin, or heirs at law; she told me not that she knew of, she could answer for the most part only in monosyllables. I therefore put the question to her thus again; When you are gone will all your family be gone? She answered yes. I questioned her as to her age and the place of her birth. I think she said as to her age, about eighty; I forget the answer as to the place of her birth, but she named it. I then questioned her as to her property. I asked her if she was aware that she would be entitled to a considerable sum as the nearest relation of Mrs. Braddon? She answered, yes. I said to her then, I am now going to make your will to give that property away. What do you wish to do with it? I think that she paused, and I then put the questions to her in a leading form—Do you wish to give your nurse the greater portion of it? The deceased replied, oh yes, she has been very kind to me. I asked, to whom else will you give anything? I think her answer was the nurse, whom I think she called Mrs. Woollett, and Mr. Sankey. I then asked her from the paper, which I now have in my hand, questions as to the specific legacies. Did she wish to give 200*l.* to the Kent and Canterbury Hospital. She said, yes. I questioned her in the same way as to each of the other specific legacies as they now stand in the will, and she answered in the same manner. I had in my hand the rough draft of her will, from which I asked her these questions, the legacies were the same in that, as they now are in the will; and I must have so written them at Mr. Sankey's house, gathering her intentions from Mr. Sankey's paper. I then asked her as to the rest of the

Lushington and Nicholl for Mr. Sankey.

Addams for Mrs. Lilley.

The *King's Advocate* for the Crown.

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property, to whom would she give that,—she said, the nurse and Mr. Sankey. I then asked her as to the proportions in which she would so give it. She said more to the nurse. I then tried to ascertain in what proportions, and I asked her how much, and then would she like to give two-thirds to the nurse, and one-third to Mr. Sankey? She said that would do. I then asked her again as to relations, and whether there were any to whom she wished to leave anything, and she said there were not. I then put some questions to her, in order to ascertain why she left any portion of her property to Mr. Sankey. I asked her who told her that she was entitled to the property of Mrs. Braddon? She said Mr. Sankey. I asked her, who is endeavouring to recover this property for you? She said Mr. Sankey. I said, if he fails, have you any means of paying him? She said, no. I said, and therefore if he recovers it, you wish him to have this portion of it, and you wish the nurse to have the other portion of it, because she has been kind to you? She answered, yes; and I said you have no relations or other friends to whom you wish to give it? She replied, no. That terminated the instructions. All this passed without interference from any other person, except that the nurse now and then took the question out of my mouth to make her hear more distinctly. Mr. Sankey and the nurse's husband were present. The nurse then at my desire talked to the deceased for my satisfaction, that I might be assured of her having understood me; and after a few minutes so occupied I went away with Mr. Sankey to his house, where we separated; and I without interference from him, revised and completed the draft. I then read it over to Mr. Sankey, who at my request gave it to his clerk to be fair copied. The draft will now be deposited of, is that which I delivered in to be annexed to my deposition. On looking it over I am unable to point out very particularly what was altered after I left the deceased; in substance it is the same as far as relates to the disposition of her property, it was completed before I left Mr. Sankey's house to go to her, no alteration was made in it in that respect, whatever was done afterwards, and in consequence of my interview with her, was merely formal. In the evening of the same day, about seven or eight o'clock, I went again to the deceased; I was then accompanied by William Wood, Mr. Sankey's clerk. We took the will with us; Mr. Sankey in the mean time went to procure another witness. Mr. Wood and I were at the deceased's dwelling, and with her for some time before the others arrived, I again entered into conversation with her, but merely on indifferent subjects; whether she was comfortable or was suffering pain, and the like; the nurse and her husband were

1836.

SIR H. JENNER.

TRINITY TERM,
May 27th.
1st Session.

Mary Decaufour, spinster, the deceased in this case, died on the 8th of June, 1835. The will

SANKEY
against
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PROCTOR.

A will pronounced against, the attesting witnesses only having been examined. The deceased being of advanced age and very infirm, and the instrument having been drawn up from directions given by the executor, and no instructions being proved to have been given by the deceased.

also present. Before Mr. Sankey and the other witness came, I sat on her bed, and read the will to her twice. I paused at the end of every bequest, and asked her if she understood it, and whether that was her intention? to each of which questions, she replied, yes. Mr. Sankey having arrived with the other witness, I went again to the bedside, asked her if I had read that paper over to her, whether she understood that it was her will; and whether she wished her property to go as stated in that paper; she answered yes, to each inquiry. I asked her if she could write; she said, no, adding I think, I never did write, or to that effect: I then told her that she must make her mark. I got pen and ink, put the pen into her hand, the nurse supported her a little with a pillow behind. I held her hand containing the pen, and thus having compressed it, so as that she could hold the pen, her hand being in some degree at least paralysed, she with my assistance just drew the pen so as to make the mark to the will. I repeated the usual words of publication, at the end of which, she said, I do. I believe that I said to her, say, I do, and she said it. I, and the two other witnesses, then attested the execution of the will in the usual manner in her presence, and in that of each other. Mr. Clark one of the witnesses, entered a little into conversation with her as I recollect; then I came away with Mr. Sankey and the two other witnesses: I returned to Mr. Sankey's house, where I sealed up the will, and gave it to Mr. Sankey. I should think that I was with the deceased for about three quarters of an hour, the first time, and nearly as long the second. I do not remember that any thing else passed, besides what I have deposed, I do not know that the deceased was capable of expressing what her wishes were without the assistance of questions; because, I believe that she could not hold conversation, or speak at such a length as would be requisite for that; but I do believe, and I have no doubt that she was quite capable of forming proper wishes as to the disposal of her property, and of expressing them with the kind of assistance of which I have deposed. I am perfectly satisfied that she was competent to understand any question that was put to her, and of refusing assent to any proposal which might have been submitted to her. The will, as executed, contains what were, as I have no doubt, her testamentary intentions; I believe her to be of sound mind, memory, and understanding, and capable in the way and to the extent of which I have deposed, of giving instructions for, and of making and executing her last will and testament, and of doing any other serious or rational act of that, or the like nature, requiring thought, judgment, and reflection.

before the Court bears date the 14th November, 1834, it is propounded by Mr. Robert Sankey,

1836.

TRINITY TERM,
May 27th.
1st Session.

SANKFY
against
LILLEY AND
THE KING'S
PROCTOR.

The paper writing now shewn to me, marked (A.) as propounded in this cause, is the will of which I have deposed. From what I have before deposed, and from my having used the words "considerable property," it would appear, but not otherwise, that she was aware of the nature or amount of the property of which she was disposing by her will, what it may amount to is, I believe, uncertain.

(Signed). W. P. BEECHAM.

The same witness on interrogatories.

Eighth.—I believe that the producent and the deceased did not stand in any other relation towards each other, than solicitor and client.

Tenth.—I was not present when any other instructions were given for the will in question than those of which I have deposed. I cannot more particularly than I have done, depose to the way in which those instructions were given. * No person gave any advice, directions, or instructions to the deceased, in my presence, or to my knowledge neither was my advice offered to her by any one, excepting, as I did myself suggest the proportions in which she might wish to leave the residue of her property, between the nurse and Mr. Sankey. I have no written instructions for the will in question, but the draft will which I have produced. I never saw any other instructions for it, except that paper of Mr. Sankey's, of which I have deposed, I cannot positively say that that paper is not yet in existence, but I believe it to have been destroyed.

Thirteenth.—I cannot further answer the matters inquired of, than as I have deposed on my examination in chief, save that I do not know, and I have no reason to believe that there was any secrecy or clandestinity in the transaction of the will in question, so that the fact thereof should not come to the knowledge of either of the deceased's relations, (of whom she had none, as I believe) or of the executors and trustees of the will of the aforesaid Mary Braddon, or of their solicitor.

Fourteenth.—The deceased did publish and declare the will in question, as I have before deposed. The deceased did what she did, of her own accord and free will, decidedly so, not at the dictation of any one; or suggestion, excepting as I have before deposed, and assisted, as I have said. To the precise words that passed, as far as I could remember them, I have already deposed. The deceased did not request me, or the other witnesses to sign our names, as such otherwise than as that request formed a part of the publication of her will.

Sixteenth.—I do undertake positively to swear, positively to my belief, that the deceased was capable of knowing, and that she did

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against
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solicitor, the sole executor named therein, and is opposed by Mrs. Mary Lilley, the sole legatee in a former will, dated the 26th June, 1826.

The Court here stated the contents of the will, and proceeded:—Mr. Sankey was introduced to the deceased about a year before her death, what the value of the property was, to which she was entitled under the will of Mrs. Braddon, does not appear, nor of what that property consists, but it is said to be considerable. The deceased had no property whatever in possession, at the time of her death, she was indeed in a state of actual pauperism.

The will has been propounded in a *condidit*, upon which the three attesting witnesses have been examined, and the question is, whether the deceased is proved to have been a capable testatrix, perfectly understanding what she did, when this will was executed—she was upwards of eighty years of age, and very infirm; she was deaf, and almost blind, had been bedridden some years, and was living in a place, described by one of the witnesses as little better than a den. Mr. Beecham, who drew the will, had never seen the deceased until the day on which the will was executed. He is an intimate friend of Mr. Sankey's, and was employed

know and understand the full nature, contents, and effect of the will propounded in this cause, and that she fully approved of the same.

Seventeenth.—I do undertake positively to swear, that I do not know, and that I have not any reason to believe that there was any control, or undue influence, or importunity, or fraud, contrivance, or circumvention, used or practised upon the deceased, in the making, framing, or procuring from the deceased, the execution of the will in question.

by him to prepare the will; it would have been more proper, if Mr. Sankey had selected a person with whom he was not upon quite such intimate terms. Mr. Beecham says, Mr. Sankey gave him a paper which he, Sankey, presumed would be the instructions of the deceased, upon the production of that paper, Mr. Beecham observed, "I had better not look at this;" and it certainly would have been better had he not looked at it at all, for he then prepared a draft of what he was told by Mr. Sankey, would be the deceased's will. The Court then, after reading Mr. Beecham's evidence, said, there is nothing, then, to connect the paper drawn up by Mr. Sankey, with the deceased, the witness says that he is satisfied that the deceased was of sound mind, that may be his impression, but the question is, are there *facts* enough to satisfy the Court that the deceased was fully capable, and that this was her will. The evidence of Mr. Clarke and Mr. Wood, the other witnesses, does not differ from that of Mr. Beecham.

Looking then at the advanced age of the deceased, the manner in which this will was drawn up, and its contents, and seeing that no instructions are shewn to have been given by the deceased, the Court requires more to satisfy it that this was her act; she is not proved to have been capable of originating such a disposition of her property.

The instructions are taken from a paper of Mr. Sankey's, he being the deceased's solicitor, and appointed the executor of the will, and the draft of the will is prepared by Mr. Beecham before he saw the deceased.

The Court does not suppose that any fraud was

1836.

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practised upon the deceased, it therefore does not condemn Mr. Sankey in costs, but pronounces against the validity of the will, on the ground of failure of proof.

The costs of Mrs. Lilley were allowed out of the estate.

CONSISTORY COURT.

TREVANION *against* TREVANION.

On the admission of an Exceptive Allegation.

1836.
 MICHAELMAS
 TERM,
 Nov. 17th.
 2nd Session.

This was a question as to the admissibility of an exceptive allegation, in a cause of divorce by reason of adultery, promoted by John Charles Bettesworth Trevanion, Esq. *against* Charlotte Trevanion, his wife. Various pleas had been admitted in the cause, and publication of the evidence had passed. After publication a further plea (a) was admitted

(a) This allegation pleaded, 1st, That in the month of August, in the year 1835, Charlotte Trevanion, party in this cause, accompanied her mother, Mrs. Mary Trelawny Brereton, to Dover in the county of Kent, where they lived together till about the end of the month of October in the said year. That about the latter end of September, or the beginning of October, a tall gentleman, with very dark whiskers, passing under the name of Hopkinson, was observed to walk up and down past the house of the said Mrs. Brereton, while the said Charlotte Trevanion was observed to be sitting at the window of the drawing-room of the said house. That about the same time the said Charlotte Trevanion rode out on horseback, accompanied only by her groom, for several days together along the Old Folkestone Road, which is less frequented than the other roads in the neigh-

on the part of the husband charging the wife with adultery at Dover, and its vicinity ; on this allegation

1836.

MICHAELMAS
TERM,
Nov. 17th.
2nd Session.

TREVANION
against
TREVANION.

bourhood of Dover, and the said gentleman was observed to be stationed in a particular part of the said road. That in the course of a few days the said Charlotte Trevanion, having contrived to make acquaintance with the said gentleman by means of dropping her whip as she passed him on the aforesaid Old Folkestone Road, he on that and on other occasions afterwards walked by the side of her horse and conversed with her.

2nd. That having discovered the name and address of the said gentleman through her said groom, whom she ordered to make inquiries for that purpose, the said Charlotte Trevanion commenced and carried on a secret and adulterous intercourse with him. That she on several occasions went alone to a stable where he kept his horse, and was there met by the said gentleman, who accompanied her therefrom. That on one occasion she waited at the said stable a considerable time until the arrival of the said gentleman thereat, and then they went away together. That the said gentleman was also observed loitering near Mrs. Brereton's aforesaid house late in the evening, and at an hour when Mrs. Trevanion was in the habit of walking out alone. That the said Charlotte Trevanion and the said gentleman were afterwards seen walking together late in the evening in unfrequented places in or near Dover.

3rd. That on one occasion the said Charlotte Trevanion rode on horseback, followed by her said groom, for four or five miles along the London Road, to a place called Lydden, where she dismounted and went into a small inn, called the Bell Inn, at that place, and inquired for the said gentleman, who had arrived there previously. That on another occasion, shortly afterwards, she again met the said gentleman at the said inn by appointment. That whilst thus at the said inn the said Charlotte Trevanion and the said gentleman remained together by themselves, in an apartment up stairs for a considerable period of time on each occasion, and on one of such occasions the waiter at the said inn, on taking some refreshment to the room in which they were, found the door thereof locked ; and that on the occasions of the said Charlotte Trevanion and the said gentleman walking together as aforesaid after dusk, and on the occasions of their resorting to the said inn as aforesaid, divers great and indecent familiarities passed between them, and they had the carnal use and knowledge of each other's bodies, and committed adultery together ; and that the gentleman, with whom the said Charlotte Trevanion became acquainted, and with whom she was seen walking late in the evening, and with whom she so had carnal

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six witnesses had been examined. The present allegation (a) exceptive to the testimony of Thomas

intercourse as hereinbefore pleaded, was not John Charles Bettesworth Trevanion, Esq., the party promoting this cause.

4th. Was the usual concluding article.

(a) The exceptive allegation was as follows. :—

1st. That no faith or credit, at least sufficient in law, is or ought to be given to the sayings and depositions of Thomas Shepard, a pretended witness, produced, sworn, and examined on a certain allegation bearing date the second session of Easter Term, to wit, Thursday, the twenty-eighth day of April, one thousand eight hundred and thirty-six, given in and admitted in this cause on the part and behalf of the said John Charles Bettesworth Trevanion, one of the parties therein. For the party proponent doth allege and propound, that the said Thomas Shepard hath in his deposition made and given in this cause, and in his answers to certain interrogatories administered to him on the part and behalf of the said Charlotte Trevanion, knowingly and wilfully deposed and answered falsely and corruptly, as hereinafter is more particularly pleaded and set forth.

2nd. Whereas the said Thomas Shepard hath in his deposition on the first article of the said allegation, deposed amongst other things, in the words or to the effect following, namely—"I visited Dover
"last Autumn, and was there about three weeks. I went on the
"twenty-fourth September, and returned about the middle of Octo-
"ber. I can't state the exact date of my leaving, but I can fix the
"date of my going there, because I had to meet a person there on
"that date. During the whole time I was there I lodged at the
"London Inn, situate in Council-Hall-street. It is in consequence
"of such my visit to Dover that I came to know anything of Mr.
"and Mrs. Trevanion, whom I believe to be the respective parties
"in this cause." And whereas the said Thomas Shepard hath, in his answer to the fourteenth general interrogatory, administered to him on the part and behalf of the said Charlotte Trevanion, on his examination as a witness on the aforesaid allegation, deposed and answered, amongst other things, as follows, to wit—"The precise cause of my
"visiting Dover in September, one thousand eight hundred and thirty-
"five, was to look after a fellow who owed me a sum of two hundred
"and twenty-four pounds on a bill. His name was Webb. I heard
"he was there, and was expected to be going to France, but I did not
"fall in with him. He was said to be at the London Inn, where
"I went and staid in hope of meeting him. I am not related to or
"connected with any resident at that place. I was the whole time
"at the London Inn. I did not keep a horse there or use one on
"hire. The precise time I went was the twenty-fourth September,

Shepard, one of those witnesses, was offered to the Court on behalf of Mrs. Trevanion.

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"but I cannot tell the precise time of my leaving. I know the one
"by my appointment to meet Webb or fall in with him, but I can
"only speak to the period of my departure by its being about three
"weeks after. I staid at Dover that length of time. I did not leave the
"place and return, but remained there, except going out for a walk.
"I returned to London when I left." Now the party proponent
doth allege and propound, that the said Thomas Shepard hath in his
said recited deposition, and also in his said recited answer to the
said interrogatory, knowingly and wilfully deposed, and answered
falsely and corruptly. For that the truth and fact was and is, and
the party proponent doth allege and propound, that the said Thomas
Shepard did not go to the London Inn, situate in Council-Hall-street, in
Dover aforesaid, on the said twenty-fourth day of September in the
year one thousand eight hundred and thirty-five, nor at any other
period in the said month of September, nor did he lodge at the said
inn for about three weeks from such period, nor until about the
middle of the said month of October, nor during any part of the said
period, and that no person whosoever lodged or resided at the said
inn during any part of the three weeks which followed the twenty-
fourth day of September in the said year one thousand eight hun-
dred and thirty-five, for any longer period than the space of four or
five days continuously. And the party proponent doth further allege
and propound, that the said Thomas Shepard in or about the latter
end of the month of February now last passed, did in fact go to the
said London Inn, situate in Council-Hall-street, Dover, aforesaid,
for the first time, and then and there introduced himself as an
entire stranger. That he was at such time accompanied to the said inn
by a person of the name of Clark, and that he, the said Thomas
Shepard, and the said Clark at such time passed, at the said inn, by
assumed names or titles, the said Clark designating himself and
being designated by the said Thomas Shepard as "Lord Rodney,"
and the said Thomas Shepard being designated by the said Clark as
"the Colonel," but that the true and correct names of the said
Thomas Shepard and of the said Clark were afterwards discovered
by the persons belonging to the said inn, as in the next subsequent
article is set forth. And that the said Thomas Shepard and the said
Clark upon such occasions remained at the said London Inn for the
space of two days, and then quitted the same.

3rd. Whereas the said Thomas Shepard hath, in his answer to the
thirty-third general interrogatory administered to him when examined
as aforesaid, deposed and answered, amongst other things, as follows:

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—"For myself I answer, that I was at the Bell Inn at Lydden on two "occasions," and also, "Both occasions were in the month of "October," (meaning and intending the month of October in the year one thousand eight hundred and thirty-five) "but the precise "dates I cannot fix more exactly:" and also, "I will swear that I "was at the said inn at Lydden on those two occasions in October "last;" and also, "I walked to and from the inn on both occasions." And whereas the said Thomas Shepard hath also, in his answer to the forty-second general interrogatory administered to him when examined as aforesaid, deposed and answered as follows;—"I have "never been at the Bell Inn at Lydden since the occasion I deposed "of, nor have I ever conversed with any of the people belonging to "it." Now the party proponent doth allege and propound, that the said Thomas Shepard hath, in his said recited answers to the said interrogatories, knowingly and wilfully deposed, and answered falsely and untruly. For the truth and fact was and is, and the party proponent doth allege and propound, that about a week or ten days after the said Thomas Shepard and the said Clark had quitted the London Inn at Dover aforesaid, as pleaded in the next preceding article, to wit, on the ninth day of March in the present year, one thousand eight hundred and thirty-six, they returned thereto, and again assumed the said pretended titles of "Lord Rodney" and "the "Colonel." That their true and proper names became known at such time to the persons at the said inn, and were entered in the books thereof accordingly from their frequently addressing each other inadvertently as Shepard and Clark respectively. And the party proponent doth further expressly allege and propound, that on the following morning, (to wit) on the tenth day of the said month of March now last passed, the said Thomas Shepard and the said Clark left the said London Inn in a post-chaise, ordered at and belonging to the same, and proceeded in company together to Lydden aforesaid, where they the said Thomas Shepard and the said Clark got out of the said chaise, and went into the said Bell Inn, at which they had ordered the postillion or chaise-driver to stop and where they remained for a considerable time, after which they took the said chaise on and discharged the same at Canterbury.

4th. Whereas the said Thomas Shepard hath, at the commencement of his aforesaid deposition made and given by him when examined as a witness in this cause, described himself as of "No. 26, "Tavistock-street, Covent Garden, in the county of Middlesex,

JUDGMENT.

DR. LUSHINGTON,

I am now to deliver my opinion upon the admissibility of this allegation offered by Mrs. Tre-

esquire:" And whereas the said Thomas Shepard hath, at the beginning of his deposition on the first article of the aforesaid allegation, deposed, amongst other things, in the words or to the effect following, namely, "I have no house in town, but when in London I lodge at the house above mentioned; I have no residence in the country, but not following any profession, but living on my own resources, I travel about and reside at hotels;" And hath also, in his answer to the thirteenth general interrogatory administered to him on his examination as a witness on the aforesaid allegation, deposed and answered, amongst other things, as follows, to wit, "I have not any fixed residence, when in town I live in Tavistock-street, as I deposed:" And whereas the said Thomas Shepard hath, in his answer to the second special interrogatory administered to him when examined as aforesaid, deposed and answered, amongst other things, in the words or to the effect following, namely, "I never did in my life reside in Frederick-street, Hampstead-road, nor occupy any lodging there, nor did I ever reside at Shaftesbury-place, Pimlico. I never kept the Wheatsheaf public-house in Marylebone-street; I deny it all: And hath also, in his answer to the eighth special interrogatory administered to him when examined as aforesaid, deposed and answered in the words or to the effect following, namely, "I deny that I ever lived in Shaftesbury-terrace, Pimlico, or in any house in the Edgware-road." Now the party proponent doth allege and propound that the said Thomas Shepard hath, in his said recited deposition, and also in his said recited answers to the said interrogatories, knowingly and wilfully deposed, and answered falsely and corruptly; for the truth and fact was and is, and the party proponent doth allege and propound that the said Thomas Shepard did, in fact, keep the aforesaid Wheatsheaf public-house in Marylebone-street, in the county of Middlesex, from in or about the latter end of the year one thousand eight hundred and twenty-nine until in or about the year one thousand eight hundred and thirty-one. That the said Thomas Shepard did afterwards for some time live and reside in Shaftesbury-terrace, Pimlico, in the same county, and did, subsequently thereto, live and reside in Frederick-street, Hampstead-road, in the same county, and did also upon one occasion live and reside at No. 70, in the Edgware-road, in the same county. And that he, the said Thomas Shepard, did, in fact, so live and reside, or occupy and hold, a house or lodging in Frederick-street, Hampstead-

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Facts and circumstances, which have no bearing on the issue in the cause, cannot be pleaded in order to discredit a witness.

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vanion, and which is exceptive to the evidence of Thomas Shepard, a witness who had been examined

road, at the very time of his production and examination in chief, and upon interrogatories as a witness in this cause. And the party proponent doth further allege and propound that Thomas Shepard, who so kept the Wheatsheaf public-house in Marylebone-street as aforesaid; and Thomas Shepard who so lived and resided in Shaftesbury-terrace, Pimlico, as aforesaid; and Thomas Shepard who so lived and resided in Frederick-street, Hampstead-road, as aforesaid; and Thomas Shepard who lived and resided at No. 70, in the Edgeware-road, as aforesaid; and Thomas Shepard, the pretended witness produced and examined on the aforesaid allegation given in and admitted in this cause, and therein describing himself as residing at No. 26, Tavistock-street, Covent-garden, in the county of Middlesex, esquire, was and is one and the same, and not divers.

5th. Whereas the said Thomas Shepard hath in his answer to the fifth general interrogatory administered to him on his examination as a witness on the aforesaid allegation, deposed and answered amongst other things as follows, to wit. "The first person to whom "I ever mentioned the circumstances, of which I have deposed on "my examination, was a friend of mine of the name of Pook; he "lives at No. 14, Princes-street, Cavendish-square; it is about three "months ago;" and also, "In about a fortnight after my friend "Pook recalled to my recollection what I had told him, and asked me "if I should have any objection to state it again before a solicitor; I "said it was a devilish disagreeable thing and I had rather not, but "he said I might be compelled, and so I consented, and my friend "Pook then took me to the office of Mr. Dignam, in Gerrard-street, "Soho, and he questioned me as to what I had seen of Miss Brerton at Dover, and I told him the outlines of it:" And whereas the said Thomas Shepard hath also, in his answer to the fifteenth general interrogatory administered to him when examined as aforesaid, deposed and answered, amongst other things, as follows, to wit, "I "certainly will swear that my said visit to Dover was not made "designedly or expressly for any purposes connected with this suit;" and also, "I will and do swear that at that time I had not ever had "any interview or consultation with or instruction from the producer, or any person on his behalf, concerning the suit or evidence "to be sought or adduced against her; I was an entire stranger to "all the parties;" And whereas the said Thomas Shepard hath also, in his answer to the sixteenth general interrogatory administered to him when examined as aforesaid, deposed and answered, amongst other things, as follows, to wit, "The only acquaintance I have with

on a plea charging her with adultery at Dover and its vicinity, in the autumn of 1835.

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"Mr. Dignam is through this business; it was my friend Mr. Pook who introduced me to him;" and also, "I do understand Mr. Dignam to be Mr. Trevanion's attorney, but I don't know how long he has been so, nor of his being one of many agents employed by him;" and also, "I am not aware what steps Mr. Dignam has taken to obtain other evidence in the business. I know nothing of his being at Dover to beat up for evidence." Now the party proponent doth allege and propound that the said Thomas Shepard hath, in his said recited answers to the said interrogatories, knowingly and wilfully deposed and answered falsely and untruly: for the truth and fact was and is, and the party proponent doth allege and propound that the said Thomas Shepard had, long previously to the periods deposed of by him as aforesaid, well known the said James Dignam, who was and is an attorney now residing and carrying on his business at No. 26, in Gerrard-street, Soho, in the county of Middlesex, and who previously thereto resided and carried on his said business at No. 2, in Bride-court, Fleet-street, afterwards at No. 1, in Warnford-court, Throgmorton-street, afterwards at No. 20, in Throgmorton-street, respectively in the city of London, afterwards at No. 69, in Newman-street, Oxford-street, afterwards at No. 26, in Tavistock-street, Covent-garden aforesaid, and afterwards at No. 6, in King-street, Holborn, respectively in the said county of Middlesex, and had employed the said Dignam as his attorney in various matters of business. And the party proponent doth further allege and propound that the said James Dignam accompanied the said Thomas Shepard and the said Clark to the London Inn, in Dover aforesaid, upon the occasion of their going to the said inn on the ninth day of March last, as pleaded in the third article of this allegation, and was upon such occasion in company and in communication with them at the said inn.

6th. That on or about the day of , one thousand eight hundred and thirty-six, a rule was obtained out of his Majesty's Court of King's Bench, calling upon the editor or proprietors of the Satirist Newspaper to show cause why a criminal information should not be filed against him, her, or them for publishing in the said newspaper, of the twenty-ninth day of May, one thousand eight hundred and thirty-six, a libellous attack on the character of one Simon Digby, esquire, therein represented or held out as a common gambler, and of that description usually denominated "legs," or "blacklegs." And the party proponent doth expressly allege and propound that for the purpose of obtaining or assisting in obtaining

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In opposition to the admission of the allegation, it has been suggested, that the Court may, without

the discharge of such rule, one Thomas Shepard did on or about the eleventh day of the month of June, one thousand eight hundred and thirty-six, make and swear to a certain affidavit exhibited in the said court on behalf of the said editor or proprietors of the said newspaper, wherein he described himself as of "Frederick-street, Hampstead-road, in the county of Middlesex, gentleman," and in which affidavit he, the said Thomas Shepard, amongst other things, swore that about four years ago he, the said Thomas Shepard, being at Brighton, was there introduced to the said Simon Digby, who, he in his said affidavit stated, was commonly known by the name of "King Digby," and that he the said Thomas Shepard became intimately acquainted with the said Simon Digby. That some time after this introduction the said Simon Digby called upon him, the said Thomas Shepard, at his then residence in Shaftesbury-terrace, Pimlico, in the county of Middlesex, and that upon his, the said Thomas Shepard's invitation, the said Simon Digby dined with him, and that after dinner the said Simon Digby proposed to him to have a game at cards, at the same time observing to him, the said Thomas Shepard, that he, the said Simon Digby, would give him his revenge for the few pounds which he, the said Simon Digby, had, at Brighton aforesaid, won of him, the said Thomas Shepard. That they accordingly commenced playing at cards at a game called *coarté*, and that the said Simon Digby won of him, the said Thomas Shepard, from eighty to eighty-five pounds. That he the said Thomas Shepard being surprised at this, watched the movements of the said Simon Digby and detected him slipping the king, commonly called "palming," for the purpose of cheating and defrauding him, the said Thomas Shepard. That upon making this discovery, he, the said Thomas Shepard, seized the wrist of the said Simon Digby, and that upon so doing the said Simon Digby became greatly alarmed and acknowledged that he had slipped the king, and that an altercation ensuing between them, the said Simon Digby, in dread of an exposure, returned to him, the said Thomas Shepard, the money he had so won as last aforesaid, and confessed to him that he had so palmed the king for the purpose before-mentioned. As in and by the original affidavit so made and sworn to by the said Thomas Shepard, now remaining filed of record in his Majesty's Crown Office in the Temple, London, and to be produced at the hearing of this cause, will more fully appear.

7th. That in supply of proof of the premises pleaded and set forth in the next preceding article, and to all other intents and purposes in the law whatsoever, the party proponent doth exhibit and hereto

injury to the party, suspend this allegation, and it is said that other witnesses have been examined on

annex and prays may be here read and inserted, and taken as part and parcel hereof, a certain paper writing marked with the letter (A), and doth allege and propound the same to be and contain a true and official copy of the aforesaid affidavit made and sworn to by the said Thomas Shepard, as in the next preceding article is set forth. That the same hath been duly extracted from the records of His Majesty's Court of King's Bench, kept at the Crown Office aforesaid, and hath been carefully collated and examined with the original affidavit of the said Thomas Shepard now remaining filed of record therein, and hath been found to agree therewith. And the party proponent doth expressly allege and propound, that Thomas Shepard, who made and swore to the said affidavit, and Thomas Shepard, a witness produced; sworn, and examined in this cause on behalf of John Charles Bettesworth Trevanion, esquire, party in this cause, and the witness whose evidence is now excepted to, was and is one and the same person, and not divers.

8th. That after the examination in chief of the said Thomas Shepard as a witness in this cause, to wit, on or about the sixteenth day of June now last passed, certain special interrogatories were administered to him on the part and behalf of Charlotte Trevanion, wife of the said John Charles Bettesworth Trevanion, and four of which said special interrogatories were in the terms following, to wit. —“ *Fourth*, Do you not know or have you not heard, and do you not “ believe, that on or about the thirteenth day of June, in the present “ year, a question came before the Court of King's Bench relative to “ a rule obtained against the editor, or proprietor, or proprietors of “ the aforesaid Satirist Newspaper, to shew cause why a criminal “ information should not be filed against him, or them for publishing “ a libel in the said newspaper of the twenty-ninth day of May last, “ reflecting on the character of a person named Simon Digby? Did “ not such libel, as you know, or have heard and believe, state that “ the said Simon Digby was more generally called King Digby from “ his skill in palming that card at the game of *ecarté*, and that he had “ long enjoyed an enviable notoriety amongst the ‘legs,’ and was “ then living in obscurity in Devonshire, but that he had been at the “ last Epsom races sharply on the look-out for flats, or to such or “ the like effect? Did you not, for the purpose of meeting the said “ question, make and swear to an affidavit on behalf of the said “ editor, or proprietors, or proprietor of the said Satirist Newspaper, “ and was not such affidavit, as you know, or have heard and “ believe, made use of upon the said occasion on his or their behalf?

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the same plea, and that the testimony of this witness may ultimately turn out not to be important; of

“Did you not swear, amongst other things, in such affidavit, that
“the said Simon Digby had in fact been guilty of practising what is
“termed ‘palming’ at the game of *ecarté*, and that he was known
“amongst the ‘legs’ at Brighton by the name or title of ‘King Digby’
“in consequence thereof, and that you were introduced to him at
“Brighton, or to such very effect? Did you not also therein swear
“that, after such your introduction to him, the said Simon Digby
“called upon you at your then residence at Shaftesbury-place,
“Pimlico, and that on your invitation he dined with you, or that on
“his invitation you dined with him, and which, and that after dinner
“the said Simon Digby proposed to have a game at cards, saying he
“would give you your revenge for the few pounds he had won of you
“at Brighton? That you accordingly commenced playing at cards,
“and that the said Simon Digby won eighty-five pounds, or some
“and what other sum: That you were surprised at this, and that
“you watched the movements of the said Simon Digby, and detected
“him palming a card for the purpose of cheating you: That upon
“your making this discovery, you seized the wrist of the said Simon
“Digby, who then became alarmed, and acknowledged that he had
“slipped the king, and returned to you all the money, and confessed
“he had palmed the king, or to such or the like effect? Will you
“swear that you did not in the said affidavit swear to the very same
“effect as now interrogate? If yea, in what respect will you now
“swear that you did not in the said affidavit swear to the effect
“interrogate, and how otherwise will you now swear that you
“swore in the said affidavit in respect to any or either of the matters
“interrogate? *Fifth.* At or by whose instigation, solicitation, or
“procurement, did you make and swear to the affidavit inquired
“after by the next preceding interrogatory, and for what motive or
“inducement did you make and swear to the same? Who drew up
“and prepared the said affidavit, and from whose instructions? Will
“you swear that the same was not directly or indirectly drawn up or
“prepared by or from the direction or instructions of Dignam,
“the agent or attorney of the producent in this cause? Will you
“swear that the said Dignam was not in any manner, either directly
“or indirectly, concerned in or connected with the preparation of or
“swearing to the said affidavit by you? Will you swear that the
“said Dignam was not, either directly or indirectly, and in what
“manner, and on whose behalf connected with the said proceedings?
“*Sixth.* When, where, and by whom were you introduced to the
“said Simon Digby, and who was or were present at the time? To

this it is impossible for me to form an adequate judgment, for if I were to read the whole of the

“what ‘legs’ at Brighton was the said Simon Digby, to your knowledge, known by the name or title of ‘King Digby?’ How soon after any such introduction did the said Simon Digby call upon you at your then residence in Shaftesbury-place, Pimlico; at what precise time did he so call upon you, and who was or were present at such time? When precisely, and where did the said Simon Digby dine with you, as you stated in the said affidavit, and who was or were present at the time? Was he at such time known to you by the said name or title of ‘King Digby?’ When precisely, and where did you and the said Simon Digby play at cards after such dinner, and who was or were present at the time? Was it at your own house or at a gaming-house; and if the latter, by what name is the same usually known? Who, by name, was or were present when you detected (if you did detect) the said Simon Digby in palming a card, and when you seized (if you did seize) the wrist of the said Simon Digby; and where do such persons respectively or where does such person reside? Upon your oath, did not your aforesaid affidavit omit all mention of time, place, or the presence of any other person or persons? Will you swear that you were ever at any time in the company of the said Simon Digby in the presence of any third persons or any third person known to the said Simon Digby? If yea, who by name and where do such persons or does such person reside? *Seventh.* Let the paper writing, hereto annexed and marked No. 1, be produced and shown to the said Thomas Shepard; and let him be further asked:—Upon your oath, is not the same, as you know or believe, a true copy of the affidavit made and sworn to by you as before interrogate? Will you swear that the same is not so? In what respect will you swear that the same differs therefrom?” And the party proponent doth expressly allege and propound that, notwithstanding the premises in the fourth, sixth, and seventh preceding articles of this allegation pleaded, he, the said Thomas Shepard, in answer to the said special interrogatories severally and respectively, hath sworn and deposed in the terms following, to wit: To the said *fourth* interrogatory,—“I have no knowledge of the matter inquired after in this interrogatory, except from reading it in the newspaper. I think it was in the Morning Herald, in one of the eating-houses in the city, that I read it: I read as far as I recollect that one Thomas Sheppard had applied for a rule in the Court of King’s Bench, in June of this present month, last Tuesday I think, for a criminal information against the Editor of the Satirist Newspaper for a libel on one

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depositions in the cause, it would not be competent for me to come to a conclusion whether or not the

"Simon Digby. I read it, having my attention drawn to it on account of the similarity in the name, but it was not my name; it was spelt with two 'p's,' mine is with one, and I was not the person. I deny all knowledge of the transaction. I made no affidavit in the matter. I do not know the interrogate Simon Digby or King Digby, or by whatever name he is called." To the said *fifth* interrogatory,—“I know nothing of the affidavit nor of Mr. Dignum preparing it, if made by any one. I was in no way connected with the matter.” To the said *sixth* interrogatory,—I have no knowledge of the said Simon Digby. I never played at cards with him. I never dined in his company at Brighton or Shaftesbury-place, or any place, or any where. I never was in his company at all.” And to the said *seventh* interrogatory, (after the copy of the affidavit or exhibit annexed to and described in the interrogatory had been referred to the said witness and perused by him,) “I solemnly deny all knowledge of the transaction therein-mentioned, except from reading the account of it in the public paper. That affidavit was not made by me. In the paper I am positive the name was with two 'p's,' and I observe there is an erasure in the name as spelt in the affidavit, as if it was copied differently and with a second 'p' at first; but it does not relate to me.” And the party proponent doth further expressly allege and propound that, by reason of the premises, the said Thomas Shepard hath, in such his answers to the said special interrogatories, knowingly and wilfully sworn and deposed falsely and corruptly.

9th. That the names “Thomas Shepard,” several times set and subscribed to the original deposition made and sworn to by Thomas Shepard, the witness produced, sworn, and examined in this cause, and whose evidence is now excepted to, were and are of the own proper handwriting, and subscription of Thomas Shepard who kept the Wheatsheaf public-house in Marylebone-street, and who afterwards lived and resided in Shaftesbury-terrace, Pimlico, and after that in Frederick-street Hampstead-road, and who also at one time lived and resided at No. 70 in the Edgeware-road, severally in the county of Middlesex, all as in the fourth preceding article of this allegation pleaded, and are so well known or believed to be by divers persons of good character, credit, and reputation, who knew and were well acquainted with the said Thomas Shepard whilst living and residing in the aforesaid several places, all, some, or one of them, and who have frequently seen the said Thomas Shepard write and subscribe his name to writings, and who have thereby or by other

testimony of this witness would be important to the disposal of the cause. It is true that there are

means become well acquainted with his manner and character of handwriting and subscription. Also that the names "Thomas Shepard set and subscribed to the original affidavit, now remaining filed of record in his Majesty's Crown Office in the Temple, London, as in the sixth and seventh preceding articles of this allegation is pleaded, were and are of the own proper handwriting and subscription of Thomas Shepard who kept the Wheatsheaf public-house in Marylebone-street, and who afterwards lived and resided in Shaftesbury-terrace, Pimlico, and after that in Frederick-street, Hampstead-road, and who also at one time lived and resided at No. 70, in the Edgeware-road, severally in the county of Middlesex, all as in the fourth preceding article of this allegation pleaded as aforesaid, and are so well known or believed to be by divers persons of good character, credit, and reputation, who knew and were well acquainted with the said Thomas Shepard whilst living and residing in the aforesaid several places, all, some, or one of them, and who have frequently seen the said Thomas Shepard write and subscribe his name to writings, and who have thereby or by other means become well acquainted with his manner and character of handwriting and subscription. Also that the names "Thomas Shepard" several times set and subscribed to the aforesaid original depositions, and the names "Thomas Shepard" set and subscribed to the aforesaid original affidavit, were and are of the proper handwriting and subscription of one and the same person and not of divers, and are so well known or fully believed to be by divers persons of good character, credit, and reputation, accustomed to examine the formation of the letters of different handwritings and subscriptions, and from their general occupations, and otherwise well skilled in handwriting.

10th. Whereas the said Thomas Shepard hath in his answer to the twelfth general interrogatory, administered to him on his examination, as a witness on the aforesaid allegation, deposed and answered, amongst other things, as follows, to wit:—"The amount of my annual income is about three hundred pounds per year. It is derived partly from leasehold estate and partly from cash. The leasehold brings me about £94 a-year. It is situate at Somer's-town; in Back-lane there. It consists of four small houses let to working people: plasterers and such persons. One, a Mr. Henry Brown, who pays me £24 a-year, another named Johnson, who pays £26 a-year; this is No. 18, the other No. 17, a third named William Stone, pays £24, and the fourth, named Hemmings, pays £20. There is a small ground-rent of £5 to be deducted, so that the net

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cases in which the Court may usefully and without danger suspend the admission of an exceptive alle-

income is £89." Now the party proponent doth allege and propound, that the said Thomas Shepard hath in his said recited answer to the said interrogatory knowingly and wilfully deposed and answered falsely and untruly. For that the truth and fact was and is, and the party proponent doth allege and propound, that there is not and was not at the time at which the said Thomas Shepard deposed and answered as aforesaid, to wit, in the month of June in the year one thousand eight hundred and thirty-six, any place in Somer's-town aforesaid called or known by the name of Back-lane, nor are there at this present time; nor were there during the month of June aforesaid any persons known by the names of Henry Brown, Johnson, William Stone, or Hemmings, and agreeing with the descriptions of such alleged persons so deposed of as aforesaid by the said Thomas Shepard, residing in any lane, street, or place in Somer's-town aforesaid.

11th. Whereas the said Thomas Shepard hath also in his deposition on the first article of the said allegation deposed, amongst other things, in the words or to the effect following, namely—"Nor did I
"at Dover know Mrs. Trevanion by that name, but considered her to
"be a Miss Brereton, and heard her spoken of by that name. The
"first time, as well as I recollect it to have been, that I saw her was
"about four days after I had gone to Dover. I was at the Ship
"Hotel in the afternoon, about four or five o'clock, taking wine
"with a friend, a young man named Hendry, who is since gone to
"Spain in some situation in General Evans's service, I think as
"commissariat, and whilst sitting with him at one of the boxes in
"the coffee-room, a person in the room, whom I had heard addressed
"as Mr. Wright, but did not know, said to his friend, who was a
"stranger to me, in allusion as I supposed to some female then
"passing, 'There goes Miss Brereton,' adding 'a damned nice piece;'
"being close to him I heard his words, and I peeped through the
"window, which is a bow, and saw two ladies coming up, walking
"arm in arm, both rather tall, and the one within or nearest to the
"window I understood him to point out to his friend as Miss Brere-
"ton." Now the party proponent doth allege and propound, that the said Thomas Shepard hath in his said recited deposition knowingly and wilfully deposed falsely and untruly. For the party proponent doth allege and propound, that there is not, and was not in the month of September or October, one thousand eight hundred and thirty-five, any coffee-room in the Ship Hotel in Dover aforesaid containing any boxes or other divisions whatever.

12th. That all and singular the premises were and are true, &c.

gation. But they are cases very different from the present. Cases where according to the plea and the

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THOMAS SHEPARD, of Frederick-street, Hampstead-road, in the County of Middlesex, Gentleman, maketh oath and saith, That about four years ago, being at Brighton, he this deponent was there introduced to Simon Digby, who this deponent saith is commonly known by the name of "King Digby," and who is the person who hath made an affidavit in support of an application to this Honourable Court for a criminal information against John Prichard Eve and Sophia Sylvester Parlby, and this deponent became intimately acquainted with the said Simon Digby: That some time after this introduction the said Simon Digby called upon this deponent, at his this deponent's then residence in Shaftesbury-terrace, Pimlico, in the County of Middlesex; and upon this deponent's invitation the said Simon Digby dined with this deponent; and that after dinner the said Simon Digby proposed to this deponent to have a game at cards, at the same time observing to this deponent that he the said Simon Digby would give this deponent his revenge for the few pounds which the said Simon Digby had, at Brighton aforesaid, won of this deponent: And deponent saith that the said Simon Digby and this deponent accordingly then and there commenced playing at cards at a game called "ecarté," and the said Simon Digby won of this deponent from eighty to eighty-five pounds; and that this deponent, being surprised at this, watched the movements of the said Simon Digby, and detected the said Simon Digby slipping the king, commonly called "palming," for the purpose of cheating and defrauding this deponent: That upon deponent making this discovery, he this deponent seized the wrist of the said Simon Digby, and upon so doing he the said Simon Digby became greatly alarmed, and acknowledged that he had slipped the king; and an altercation ensued between him and this deponent, the said Simon Digby, in dread of an exposure, returned this deponent the money he had so won as last aforesaid, and confessed to this deponent that he had so palmed the king for the purpose before mentioned.

Sworn in Open Court

THOMAS SHEPARD.

the 11th day of June, 1836,

By the Court.

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evidence of the witness himself, the testimony may probably *not be of great importance*, and where the contradictions pleaded in the exceptive allegation are of a *less stringent kind*, than in the present case. The witness in this case expressly deposes, to seeing Mrs. Trevanion at the Bell Inn at Lydden, in company with a gentleman, and it is here, and on this occasion, that the adultery is pleaded to have occurred.

It is not sufficient in such a case for the parties producing the witness to say that they will not rely on the evidence of the witness after publication. The other party has a right if she can produce an admissible exceptive allegation to have it admitted.

The proving such exceptive allegation may leave the case in a very different position than if the witness had not been examined at all. The producing a witness clearly perjured, is not an unimportant ingredient in any cause : its effect may be more or less prejudicial to the party, according to the circumstances of the case.

With regard to the expenses falling on the husband : the length of the cause, and the consequences in respect to the husband's pecuniary resources may be much to be deplored, but it is wholly impossible, almost at the conclusion of a cause where the husband has brought in *a new plea after publication*, alleging a fresh act of adultery, that I should, on that ground alone, exclude an exceptive allegation.

I will now proceed to consider the contents of the allegation, to see what parts are in substance clearly admissible on principles not controverted, and what

parts depend on the solution of questions disputed by the counsel.

The first Article is merely formal, and requires no observation.

II. The *Second* Article appears to me to bear directly on the issue in the cause, and I ought to guard myself here against mistake or misapprehension. I consider that it has a bearing on the issue, yet is not the issue itself; nor pleadable before publication, for the witness has deposed to seeing Mrs. Trevanion at Dover and Lydden in September and October 1835, and to circumstances leading to adultery; his absence during the whole period is a fact most material to the decision of the cause, and the whole credit of the witness is involved in the question whether he has told a falsehood of this sort; this article is in substance admissible. I think the latter averments as to this person's arrival for the first time in February 1836, and the names by which he and his companion passed, are fairly pleaded, to bring out more clearly and prominently the leading contradiction. I admit the *Second* Article.

III. On the same principles, I think the *Third* Article in substance admissible, but that it must be reformed; as it now stands, it does not directly contradict the principal point, namely, that the witness was not at Lydden during September and October, 1835, it does contradict his statement that he never had been there since; if this were the only contradiction it might be subject to different considerations, but coupled with the leading one, I think it admissible; it should recite other parts

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of the evidence of the witness and contradict them.
—to be reformed.

IV. The contradiction in this article is as to the residences of the witness—this is not pertinent to the issue. I shall reserve the consideration of this article until I come to observe upon some of the subsequent articles.

V. The contradiction in this article does not come out in a very clear and direct point of view. In substance it is this,—that the facts were accidentally mentioned by the witness to Pook, that by him he was taken to Dignam. That witness did not go to Dover for the purposes of this suit—that his only acquaintance with Dignam was through this suit; that he knew nothing of the steps taken by him to obtain other evidence, or of his visit at Dover to beat up for evidence. The *contradiction* is, that he had been long previously acquainted with Dignam, and had employed him as an attorney. That Dignam accompanied the witness and Clark when they went to Dover, March 9.

Now this contradiction is partly direct and partly inferential—*direct* as to the acquaintance; *inferential* as to his knowledge of Dignam proceeding to obtain other evidence.

I think however that it is so strongly inferential, that, coupled with the preceding contradiction, which is quite direct, it would be straining too much to reject it on that ground only. The main point is whether the contradiction is relevant to the issue in the cause or collateral. It may not always be easy to draw a precise line, and if doubt fairly arises, I think the Court should lean rather to ad-

mission than rejection. The issue is adultery at Dover and Lydden. The witness represents his evidence as given by mere accident as to such adultery, *without previous acquaintance with the attorney*, or knowledge on his part that evidence was being collected by him. I feel it very difficult to say that the contrary of such averment is wholly immaterial to the decision of the issue I have to try, *especially in conjunction with the Articles previously admitted*. I cannot say that proof of a previous acquaintance with the attorney and having accompanied him on the 9th of March, when he went to collect evidence, might not influence the mind of the Court in determining the direct issue in the cause. I act more safely by holding this contradiction to be within the acknowledged limits, even if I have some doubt. The Article must be reformed, by striking out the residence of Dignam, as leading to superfluous matter ; and adding, at the conclusion, *that Dignam was then and there employed in collecting evidence in this cause*.

The *Sixth*, *Seventh*, *Eighth*, and *Ninth* Articles, plead in substance :

VI. The *Sixth* that, witness made an affidavit in the Court of King's Bench when a rule had been moved for against the proprietors of the *Satirist*.

VII. The *Seventh* sets forth the contents of that affidavit, and exhibits a copy.

The *Eighth*, at great length recites all the inquiries into all the proceedings in the Court of King's Bench upon interrogatories administered to the witness ; in the answers to which the witness denies that he made any such affidavit, and ignores the whole transaction. The contradiction is that

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all such answers are false and that he did make such affidavit.

There can be no doubt that the whole of this matter is foreign to the issue in the cause; and, therefore, subject to such determination as the Court may deem it its duty to apply to such exceptive articles presently, when the principles applicable to them have been discussed.

IX. The *Ninth* is merely as to the handwriting of the witness.

X. The *Tenth* Article is a contradiction of the witness's statement as to his property, and is also an issue foreign to that in the cause.

XI. The Eleventh Article I reject on the ground that the contradiction is on too trivial a point, and such as, if proved, could not destroy the credit of the witness.

There remain then the *Fourth*, *Sixth*, *Seventh*, *Eighth*, *Ninth*, and *Tenth* to be disposed of. I consider these Articles, and especially the *Sixth*, *Seventh*, *Eighth*, and *Ninth* to raise questions *wholly foreign* to the issue in the cause, viz. Adultery at Dover and its vicinity.

On the other hand if this their character be not a fatal objection to them, the contradictions are direct and positive, such as if proved would establish *wilful false swearing*. The question of law now arises in a clear and strong point of view.

These Articles are not equivocal—they are *foreign to the issue*; they are *direct contradictions*; if admissible and proved, the credit of the witness must be seriously affected, and the issue may depend on that evidence.

No one, morally speaking, can doubt that if a

witness is proved to have corruptly forsworn himself in a matter however distinct from the question before the Court, his evidence as to other points must be deserving of little credit; it is indeed on this principle that a conviction for perjury disqualifies a witness. The truth must not be disguised, if Mrs. Trevanion be at liberty to prove this witness perjured in another and different transaction, though totally unconnected with this issue, she may, by such means, discredit him in this issue, and the result of the cause might possibly turn upon it; I admit therefore fully the importance and value of these Articles to her.

The question is whether the law of this Court allows of such a mode of discrediting a witness, or whether for reasons of general public utility, however important in an individual case, it is not prohibited.

I am anxious to examine this question in all its bearings, and fairly to apply to it every test by which it can be elucidated. I admit that by this mode of proceeding, by proving contradictions of this kind, the truth may sometimes be attained, when the exclusion might lead to error, and possibly injustice; but though the object of all tribunals is to ascertain the truth—the only basis of justice—all Courts, for various reasons, have been accustomed to exclude various modes of investigating it.

In these Courts there is no re-examination of a witness, nor *viva voce* examination, because the expense would be enormous, and the ends of justice can generally be attained without.

So, in the courts of law, certain rules of proceed-

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ing are adopted : so, as to Appeals, and the number of them. It is not sufficient therefore to solve this question to acknowledge that the admission of such plea might elucidate the truth.

The end of all systems of jurisprudence is to establish a course of proceeding and of investigation, by which justice may be generally attained at an expense, and with a degree of expedition, best suited to the interests of mankind ; in so doing many modes of proof, as I have said, are excluded, not because they are wholly useless, but because to adopt them, however beneficial in an individual case, would, by delay and expense, defeat the great purpose for which Courts are established. In these, as in all other human institutions, the good of the many is consulted, though in a few possible cases individuals may suffer.

It remains therefore to be considered, whatever may be the intrinsic value of this species of evidence, whether according to the doctrine and practice of English tribunals it is admitted or rejected from the ill consequences to which its admission might lead.

For the sake then of illustrating the rules generally applied to such matters, it is expedient to inquire what is the course pursued in other Courts? at the same time, though I have prosecuted this inquiry with much care, I feel very great diffidence in expressing my opinion as to the result, and it is very probable that I may in some respects draw erroneous conclusions from the want of that practical knowledge which is the best safeguard against misunderstanding authorities.

And it is right also to observe that this is a

question not so much of principle as of rule for the convenient administration of justice. *Principle* applies to the rejection of hearsay evidence—of the evidence of persons interested—and questions of that kind; on such matters it is most desirable that all Courts should agree. In this question the convenience or inconvenience form a main consideration, for that the evidence might have effect if received, I think cannot be doubted, and though the practice of other Courts would be entitled to due consideration, yet looking at the difference in the modes of proceeding, a rule of *practice* would not have the same binding effect on my judgment as a doctrine established on *principle*.

With respect to the rule of *common law*.

I have looked at the cases, and especially the decisions of the judges pronounced Oct. 20th, 1820, in the trial of Queen Caroline, and I have sought information from those best able to correct the infirmities of my own judgment. The result I conceive to be this,—*That if upon cross-examination, (in chief it could hardly arise) a question be put to a witness touching a fact or a declaration, verbal or written, foreign to the issue to be tried, the party so putting the question must abide by the answer, and cannot be permitted to contradict it by other testimony for the purpose of discrediting the witness.*

The reasons for such rule are several.

First, as relates to the witness, that he cannot be prepared to defend all the actions of his life.

Secondly, That such inquiries could not be conducted without an expense and delay which would render the administration of justice so

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grievously burdensome to the suitors, as to defeat the ends for which all Courts are established.

The next inquiry to which I have deemed it my duty to resort, is as to the rule prevailing in our Courts of Equity, and I have certainly experienced greater difficulty in this branch of examination, though much assisted : I must repeat again therefore, the extreme diffidence I entertain as to the correctness of my own conclusions, nor would I have ventured on this path had it not appeared to me that the investigation of the whole subject would have been incomplete without it, and also that the practice in Courts of Equity being by written evidence, might bear upon these Courts as more proximately analogous.

Before I proceed-further, there is one point which I must endeavour to clear up, or some confusion may arise ; I mean of what is or is not *pertinent* or *material* to the issue. That expression I apprehend to be used with greater strictness than we are sometimes wont to do ; for instance, a declaration of a witness relative to the issue in the cause, is not deemed as pertinent to the issue in the cause ; such expression is confined to evidence direct and material to the issue, and does not extend to what concerns the credit of a witness.

It appears to be decided by the case of *Mill v. Mill*, (a) that it is not competent to the defendant to examine his witnesses in chief to the character and credit of the plaintiff's witnesses.

By the same case as well as other cases it is ruled

(a) 12 Vesey, 407.

that examination to the credit cannot be done without special application to the Court. 1836.

It being thus determined (and it is the result of all the cases) how it cannot be done, and in what form it may be done; the next inquiry is under what limitations those Courts will permit such applications.

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The authorities are stated in *Gresley on Evidence in Courts of Equity*, (a) and in *Maddock's Practice*, (b) and it results from these authorities that those Courts are exceedingly careful not to encourage applications of this description.

It also appears that the custom is to except *after publication* to the *general* credit of a witness: it is done in the form of Articles, but to what extent such Articles may go is the question of difficulty.

The first case to which I shall refer is that of *Gill v. Watson*. (c) In that case interrogatories were exhibited by the defendant for examining to the credit of one of the plaintiff's witnesses, after publication had passed some time, and the cause was set down. The first question was as to an affidavit, but the *dictum* of Lord Hardwicke it is right to notice. "The Lord Chancellor thought an affidavit necessary, and said that though at law you can examine only to the general credit, yet it is otherwise at Equity; for at law the witness cannot be prepared to defend every particular act of his life, as he does not at all know to what they intend to examine him; but upon an examination in this Court he may be able to answer

(a) *Gresley on Evidence*, p. 140.

(b) 2 *Madd. Chan. Prac.* p. 555.

(c) 3 *Atk.* 521.

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“ any particular charge as he has time enough to
 “ recollect it.” Now I think if this had been the
 whole, and nothing had been done to shake
 the force and effect of this *dictum*, it would go this
 length: that in respect to a particular charge
 against a witness’s credit, you may except to a
 witness’s testimony. But it goes on thus: “ *Quære*,
 “ it is difficult to ascertain whether this is a part of
 “ the judgment of the Lord Chancellor, or merely
 “ the remark of the reporter. *Quære*, if there is any
 “ such distinction between the examinations here and
 “ at law with regard to the credit of witnesses;
 “ because Mr. Capper, a very eminent and expe-
 “ rienced practitioner, told me that examinations to
 “ the credit are general here as well as at law, and
 “ the form of the interrogating Articles are so in this
 “ case; first that the witness is a person of ill-fame
 “ and not to be credited; secondly, that he pays no
 “ regard to the nature of an oath: and in the same
 “ manner through the several items;” that is the
 whole of the report in that case.

The case which next follows is that of *Callaghan v. Rochfort*. (a) That was a motion for a commis-
 sion to examine witnesses to the *credit* and *compe-*
tency, of a person who had given evidence in the
 cause, and against whose competency the party
 moving had exhibited Articles after publication
 passed. I need not discuss the question of compe-
 tency—as to the commission to examine in support
 of the Articles which went to the credit of the wit-
 ness, Lord Hardwicke said, “ the Court will allow
 “ such Articles to *credit* after publication, because
 “ the matters examined to in such cases were *not*

(a) 3 Atk. 643

“ *material* to the merits of the cause, but only
 “ relative to the character of the witnesses.” It is
 added, “ as these applications are most frequently
 “ made for delay merely, his Lordship said he
 “ should be extremely cautious how he grants
 “ them, and as there was no absolute necessity in
 “ this case he denied the motion.”

I now proceed to later times, (but I believe I
 have not omitted any case of importance) and I
 come now to the case of *Purcell v. Macnamara*, (a)
 This is the authority of Lord Eldon, and it is im-
 possible that a higher authority can be cited. It is
 necessary to look at the whole. A motion was
 made after publication that the plaintiff might be
 allowed to exhibit Articles as to the credit of a
 witness, interrogating as to particular facts, *viz.*
 whether he had not been a woollen-draper, and was
 insolvent, which upon his cross-examination he had
 answered in the negative. Sir Samuel Romilly
 supported the motion, which was opposed by other
 learned persons, and Sir Samuel Romilly repeat-
 edly referred to the authority of the Courts of
 Common Law, and said “ that there were two
 “ modes of impeaching evidence there, one by pro-
 “ ducing witnesses to swear that the person was
 “ not to be believed on his oath; the other by put-
 “ ting questions to him, and getting witnesses to
 “ prove that his answers were not true.” The Lord
 Chancellor said, “ it is necessary to see what these
 “ Articles and Interrogatories have been in parti-
 “ cular cases. It is clear you may discredit a
 “ witness by examining other witnesses as to the
 “ proposition he has sworn. In this Court it is

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(a) 8 Vesey, p. 324.

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“ very possible a man might be examined, who is
 “ not a competent or a credible witness, and though
 “ it is true, notice is given who the witnesses are,
 “ it may be impossible to discover the fact that he
 “ is incompetent or does not deserve credit, till
 “ after his examination ;” again, “ As to the other
 “ examination, whether you may examine either
 “ generally or particularly, or to shake his credit,
 “ whether you are to examine as to the particular
 “ facts to which he has deposed, that may depend
 “ upon the different nature of the facts: if, for instance,
 “ the fact is material to the merits of the cause”—
material to the merits is the expression—“ and the
 “ witness has sworn to it, there is great danger of
 “ bringing other witnesses, under colour of discrediting that witness, to prove or disprove such fact.
 “ It would also be endless, if you can justly require
 “ that the person deprived of that testimony should
 “ have an opportunity of examining others to the
 “ truth of those facts to set up that witness again.
 “ The *dictum* of Lord Hardwicke seems to be that
 “ the utmost you can do, under colour of examining to the credit is to examine as to the
 “ truth of facts not material, as in the case of
 “ *Chevers v. Bax*; though in a tithe cause that
 “ might be material as to the mode of tithing
 “ milk, which had fallen under the observation
 “ of that person.” In that way it may be important in other cases. “ But suppose it immaterial to the merits, and therefore less danger in
 “ permitting the examination, still there is a good
 “ deal of danger upon that, and it is better that
 “ the observation of the Court should be thrown
 “ upon the particular circumstance before the

“ examination is permitted ; for you may know it
 “ at the time of the cross-examination, and take
 “ your chance of the substance of the examination,
 “ and if it makes for you the objection is sunk ; if
 “ against you, then you come forward, having
 “ known the fact before ;” again, “ upon all that I
 “ can find you are at liberty to examine by general
 “ interrogatories as to credit, and as to such par-
 “ ticular facts only as are not material to what is
 “ in issue in the cause.”

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Then I find it determined in this case of *Purcell v. Macnamara*, that a witness might be examined as to whether he was a woollen-draper, and an insolvent. According to this decision of Lord Eldon, (for I have great difficulty in denying it to be so) a witness may be examined to prove the contrary of facts sworn to by a witness examined in the cause, not only not material to the issue in the cause, but facts totally foreign to the issue ; for it was only an act of misconduct committed by the witness himself.

I cannot help observing that the argument of Sir Samuel Romilly was much founded upon the rule of law ; but the decision seems to go much further.

The next case is that of *Wood v. Hamerton* (a) which follows *Purcell v. Macnamara*, but it contains no definition as to what facts fall within the denomination “ *not material to the issue in the cause.*” I need not advert to this case more particularly ; the plaintiff was allowed to examine witnesses on a commission by general interrogatories as to credit, and “ as to such particular facts only as are not “ material to what is in issue in the cause.”

(a) 9 Ves. 145.

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The next case is *Carlos v. Brook* (a), and though the point at issue to be decided by the Lord Chancellor was a different point, yet the expressions which fell from Lord Eldon are entitled to the greatest possible respect. It was a motion to suppress, after publication, the deposition of a witness; the Lord Chancellor said, "I think my opinion in *Purcell v. Macnamara* was right. My opinion was this: "that the Court attending with great caution
"to an application to permit any witness to be
"examined, after publication, has held where the
"proposition was to examine a witness to credit,
"that the examination is either to be confined to
"general credit, that is, by producing witnesses to
"swear that the person is not to be believed on
"his oath;" mark the words; "or if you find him
"swearing to a matter not in issue in the cause,
"and therefore not thought material to the merits
"in that case, as the witness is not produced to
"vary the case in evidence, by testimony that
"relates to the matters in issue, but is to speak
"only to the truth or want of veracity with which
"a witness had spoken to a fact not in issue, there
"is no danger in permitting him to state that such
"fact not put in issue is false; and for the purpose
"of discrediting a witness the Court has not con-
"sidered itself at liberty to sanction such a pro-
"ceeding as an examination, to destroy the credit
"of another witness who had deposed only to
"points put in issue. In *Purcell v. Macnamara*
"it was agreed that after publication, it was com-
"petent to examine any witness to the point
"whether he would believe that man upon his

(a) 10 Ves. 49.

“ oath. It is not competent, even at law, to ask
 “ the ground of that opinion, but the general
 “ question only is permitted. In *Purcell v. Mac-*
 “ *namara* the witness went into the history of his
 “ whole life; and as to his solvency, &c. It was
 “ not at all put in issue, whether he had been
 “ insolvent, or had compounded with his creditors;
 “ but having sworn the contrary, they proved by
 “ witnesses, that he, who had sworn to a matter not
 “ in issue had sworn falsely in that fact; and that
 “ he had been insolvent, and had compounded
 “ with his creditors; and it would be lamentable if
 “ the Court could not find means of getting at
 “ it; for he could not be indicted for perjury,
 “ though swearing falsely; the fact not being mate-
 “ rial. The rule is, that in general cases, the
 “ cause is heard upon evidence given before pub-
 “ lication, but that you may examine after publi-
 “ cation, provided you examine to credit only, and
 “ do not go to matters in issue in the cause, or in
 “ contradiction of them, under pretence of examin-
 “ ing to credit only. These depositions appear to
 “ me to be material to what is in issue in the cause,
 “ and therefore must be suppressed.”

Now I must say I feel it impossible to deny that the expressions of the Lord Chancellor, unless they are in some degree qualified by the general understanding of that Court—and it is not expressed whether they are so or not in the report—would support an argument that if a witness in cross-examination had deposed to a fact wholly foreign to the issue, he might be contradicted thereon.

To proceed in my inquiry,—the next case is

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that of *White v. Fussell* (a), but that goes no further than to shew that applications for examination to credit must be confined to facts affecting credit and character only, and such as are not material to the issue. This throws no light upon the subject.

Wakmore v. Dickinson (b) only shows that an affidavit is not necessary to support such a motion. I do not rely on a casual expression, that is, that the only proper question is, whether the witness is to be believed on his oath, and it would be doing injustice to the learned judge who decided that case to rule so important a point by a casual expression.

Then comes a case which is anonymous in 3 *Ves. and Beames* (c). It was a petition presented praying that an affidavit made for the purpose of discrediting the testimony of the petitioner, who had made an affidavit under a petition in bankruptcy, might be taken off the file for scandal; or that the scandalous charges might be expunged; viz., that the petitioner had been discharged from his employment by one attorney for a fraud, and by another for communicating a brief to the hostile solicitor; and that the petitioner was a hedge-solicitor and affidavit-man. The Lord Chancellor said, "The rule of the Court of Chancery in a cause, never permitted an examination as to such charges as these; though you may ask whether the witness is to be believed upon his oath; which is the course at law not going to

(a) 1 *Ves. & Beames*, 153.(b) 2 *Ves. & Beames*, 267.(c) 3 *Ves. & Beames*, 93.

“ particular facts. If the proceedings in this
 “ Court are open to the defect that has been men-
 “ tioned, that does not make it fit to introduce all
 “ this scandal.”

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The attempt to reconcile this with the decision in *Purcell v. Macnamara*, is somewhat difficult: I do not say they cannot be reconciled, but it is a matter of some difficulty.

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There have been two other cases since. The case of *Vaughan v. Worrell* (a) which was as to putting an interrogatory before publication, but after examination, as to interest, and which throws no light on the point in question; and the case of *Piggott v. Croxhall*, (b) which affirms that the interrogatories must be to facts, not material to the issue. I observe that in *Gresley*, (c) the form is this: it alleges that the witness has since his examination admitted that he had received or expected a reward, recompence, gratuity, or allowance from the defendant in case the defendant recovers in the cause, and it alleges (being the same terms as in ours), the general bad character of the witness excepted to, and that is the whole of it.

What then is the fair result of the whole? I feel compelled to say that all these authorities do not negative the proposition that witnesses may be brought to contradict a statement made by a witness on his cross-examination as to matter which is foreign to the issue. On the contrary, so far as I can judge, especially from the case of

(a) 2 Madd. 326.

(b) 1 Sim. & Stu. 467.

(c) *Gresley on Evidence*, p. 140.

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Purcell v. Macnamara, where the issue was whether certain deeds should be set aside, and where the witness was examined as to his solvency, Articles imputing false swearing on a point so foreign were admitted. I feel that it is no part of my duty to decide this matter. I should feel it extremely difficult to draw nice distinctions between one case and another; but I ought to say that, however the point may stand upon authority, having had the benefit of the opinion of persons, whose experience and station in those Courts entitle them to great respect, who agree that a party is not at liberty in those Courts to put interrogatories wholly foreign to the issue, for the purpose of contradicting the witness after publication. It is not for me, under these circumstances to pronounce any decision as to what the real state of the rule is in Courts of Equity. I find that considerable doubt, at least, presents itself, and that the point is not so clear, one way or the other, as will enable me to pronounce upon it with any degree of certainty, or to pay that attention which I should do if the point had been determined by authority in those Courts, deciding one way or the other.

Having disposed of the previous parts of this inquiry, by examining the decisions in other Courts, I now come to the concluding part, and that which if there were sufficient materials would have superseded all other. I mean the decisions and proceedings and practice of our own Courts; for sitting as a Judge of an inferior tribunal, if I found that this point had been determined and settled by a superior ecclesiastical authority, I should not have

hesitated one moment to obey that decision, nor considered myself bound to inquire what were the grounds on which it stood. Nothing I was more solicitous for than to find a decision upon the subject in these Courts. One of the learned counsel has relied on the practice of these Courts and has alleged that for a long period of time, exceptions of this nature have been admitted; but I confess I am not aware that a practice without any authority whatever is such as would govern a decision on a question like this; and I think where an objection to the admission of an allegation is made on this ground, it is better to take a decided case, than to consider the allegation as admissible according to the practice of the Court in cases of this description. I look then to the decisions. I have looked into the whole of the different instances of allegations objected to in the reports of cases in these Courts.

The subject is adverted to in a note to the case of *Evans v. Evans*, (a) and it was argued on other points, but not on this.

The only other case in which the question was mooted is the case of *Whish* and *Woollatt* against *Hesse* (b), which has been alluded to by the learned counsel, I believe, on both sides. It has been said that this case does not decide the point at issue; I must say that this proposition is subject to considerable doubt; I do conceive this to be a direct authority of the superior Court to which I am bound to defer. But I have felt unwilling to rule and decide this question on a single authority, however high, lest, by possibility, I might strain it beyond

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(a) 1 Consist. Rep. p. 95.

(b) 3 Hagg. Eccl. Rep. p. 680.

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its just bearing and true intention, and further than was meant by the learned Judge who pronounced the decision. His words are : (a) "The rule is, that you cannot cross-examine to matter not bearing on the issue and then contradict it by other evidence in order to discredit the witness : nor if a witness answers such irrelevant question before it is disallowed or withdrawn, can evidence afterwards be admitted to contradict his testimony on the collateral matter." This is the very doctrine which is held in the Courts of Common Law. In my judgment the rule laid down by the learned judge is supported not only by his high authority but rests on the same foundation, and on all the reasons on which it is maintained in the Courts of Common Law. On the evil consequences which must ensue from allowing a party to frame interrogatories wholly foreign to the matter at issue, and to be decided—to ransack the whole life of a witness—to inquire into transactions of any date or complexity (for if once permitted, and an allegation admitted, I do not see how these consequences could be averted)—and it follows too, that these courts must enter into an entire new issue, when witnesses must be examined on both sides ; and similar objections may be raised to the credit of these witnesses, and the whole repeated ; I am of opinion that the evils arising from the expense, the delay, and the inconvenience must surpass any possible benefit in individual cases. The evils here would be infinitely greater than at Common Law ; the evil mentioned by Sir John Nicholl of loading a cause with interrogatories wholly irrelevant to the issue in the cause

(a) 3 Hagg. 682.

could not be guarded against : an evil, in my judgment, of the greatest magnitude, and which, if such exceptive allegations were admitted, it would be utterly impossible for proctors or counsel to counteract. I must again declare my conviction that the rules of these Courts, equally with those of all other Courts of Justice, ought to be framed so as to administer justice with reasonable expedition, and at a reasonable expense in the great majority of cases, without attempting that minute investigation, which, even if it conduces to the discovery of truth, in individual cases, by increasing the expense and delay in all, denies real justice to the great bulk of those whom necessity or circumstances call to judicial tribunals.

Perhaps it may be thought that I have entered too minutely into this investigation, and have referred unnecessarily to the proceedings in other Courts. I have done so in accordance with the practice of all who have preceded me, and with the example of Sir John Nicholl in *Whish* and *Woollat* against *Hesse*, I have done so from an anxious desire that if this my judgment be questioned by superior authority, the whole grounds of my opinion may be distinctly known, and the error, if it be erroneous, more clearly and easily detected. I reject therefore these Articles, considering that in the situation in which I am placed, in so doing I act in obedience to authority I am bound to respect, and that I do so in accordance with that sound rule which I conceive has regulated the practice of these and other tribunals.

I reject therefore the *Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh* Articles.

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ARCHES COURT OF CANTERBURY.

BELCHER *against* BELCHER.*On Taxation of Costs.*

The husband
liable to the
costs of the
wife, unless
she has a sepa-
rate income
sufficient both
for her own
support, and
for the pay-
ment of her
costs.

This was an appeal from a sentence of the Commissary of the Court of the Dean and Chapter of St. Pauls, in a cause of divorce.

The question now before the Court was, whether the costs of the wife should be taxed against the husband; the wife having a separate income of 236*l.* per annum, the husband being a captain in the navy, with an income averaging when employed 510*l.* a-year.

SIR HERBERT JENNER.

Upon general principle, the costs of the wife must be defrayed by the husband, who is presumed to possess the whole of the property.

In this case, the husband is a captain in the Royal Navy, receiving pay as such, together with extra pay allowed to him for the survey in which he has been employed.

He is occasionally on half-pay, but when employed, his income may be taken at 510*l.* per annum; the wife has a separate income of 236*l.* per annum, which is settled and permanent, that of the husband's being subject to variations; under these circumstances, the Court would be willing to

afford relief to the husband, if it could do so consistently with established principles. But what are the exceptions to the rule that the husband must pay the wife's costs?

In the case of *Wilson against Wilson*, (a) Lord Stowell said, "it must appear that the wife has an "income correspondent to her own expenses, and "the necessary expenses of the suit, for both must "appear," and the case of *Davis against Davis* (b) was referred to by him as an authority.

In this case, the wife, from the time of her marriage, has never been assisted by her husband, but has entirely supported herself, she then has sufficient for her own subsistence. But has she enough also for the payment of her costs?

It was stated in the argument, that in this case there has been a sentence against the wife in the Court below, and that she is the appellant. The Court, however, cannot take that into its consideration. If she were to pay the expenses, how could she maintain herself?

Again, it was urged that she ought to pay her own costs, because she is living with her mother; but, as was observed by Sir John Nicholl, in the case of *Beevor against Beevor* (c), "that she (the "wife) lives with her mother does not alter the "case: her mother is not bound to maintain her."

It was stated that the costs had been waived in the Court below, but from whatever cause that arose, the husband has not been pressed by the payment of those costs. It was also said, that in certain

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(a) 2 Consist. Rep., p. 203.

(b) Ibid, p. 204, n.

(c) 3 Phill. 264.

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cases the question of costs has been reserved until the hearing of the cause, the circumstances of those cases were not, however, mentioned; the Court cannot, therefore, say how they apply to the present case.

Another argument that was pressed upon the Court was, that the husband's pay is appropriated to the service of his country—that it cannot be assigned.

But supposing the wife had had no income at all, in that case the husband must have paid both alimony and costs; the fact then of the wife having sufficient money to support herself has caused no hardship to the husband: he has thereby been relieved from the payment of alimony.

But the simple question is, is there any precedent to show that where the wife has an income of 236*l.* and the husband has 510*l.* per annum, he has been exonerated from the payment of her costs? No such case can be found. I am, therefore, under the necessity of directing the costs to be taxed against him.

It would have been much to the satisfaction of the Court if it could have found any cases in which the costs have been apportioned between husband and wife, where the incomes of both parties have been small; but I have never met with a case of the kind, nor am I aware that any such a rule ever existed.

IN THE COURT OF THE ARCHDEACON OF LONDON.

ADEY against THEOBALD.

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THIS was a proceeding instituted by Mr. Thomas Adey, one of the Curchwardens of the parish of Allhallows, London Wall, on the part of the parish, against Mr. Samuel Theobald, of Bishopsgate-street, a member of the Society of Friends (commonly called Quakers), to compel him to take upon himself the office of Churchwarden, to which he had been duly chosen.

A Quaker having been elected churchwarden, the Court under the circumstances declined to compel him to take upon himself the functions of the office.

A citation having been served upon Mr. Theobald, calling upon him to appear, and take upon himself the office of Churchwarden, he appeared, and objected thereto: he was then assigned to set forth his objections in an act on petition.

Mr. Theobald stated in the act, that he was a member of the religious Society of Friends—that he could not, consistently with his religious scruples take upon himself the discharge of the office of Churchwarden, whereby he should be called upon to take care of the goods, repairs, and ornaments of the church; to present offenders to the Ecclesiastical Court; to levy the church-rate, and to see that the parishioners duly attended to Divine Service—that his objections were increased by the extent of the declaration which he would have to make, “that he would truly and faithfully execute the office of a Churchwarden, and according to the best of his skill and knowledge, present such things and per-

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sons as to his knowledge are presentable by the laws Ecclesiastical of the realm"—that the Society of Friends never voluntarily make the payment of church-rates, and that he could not, consistently with his principles, make the above declaration—that although the act of 1st William and Mary, commonly called the Toleration Act, permitted persons who scrupled to undertake the office, to execute it by a sufficient deputy, yet that he felt that that statute afforded him no relief—that it was a maxim, no less of Christian morals than of English law, that the principal is responsible for the act of his agent, that *qui facit per alium facit per se*. That he was the only member of the religious Society of Friends resident within the parish; and he submitted that, by reason of his religious principles and scruples, he was entitled to claim relief from discharging the duties of the said office.

It was alleged in reply to this, on behalf of Mr. Adey,—that Mr. Theobald had been elected to the office in due rotation—that the parish, although extensive, contains but few inhabitants who are eligible to the office, of whom the greatest proportion have already served—that Mr. Theobald has been an inhabitant of the said parish for thirteen years, and has never before been elected—that if the scruples of Mr. Theobald prevent him from serving the office personally, or by a substitute, he was at liberty, agreeably to the custom usual on such occasions in the said parish, to pay the sum of thirty pounds in aid of the poor rates; a custom which has never before been objected to—that although Mr. Theobald is the only actually admitted member of the religious Society of Friends called

Quakers, resident in the said parish, there is another inhabitant thereof calling himself a Quaker, who will, in rotation, shortly be elected to the said office; and also several dissenters, of various denominations, all of whom allege their scruples to be equally strong with those of the said Mr. Theobald, and have stated their intention, should he be excused, of refusing to take upon themselves the office whenever elected thereto—that Mr. Theobald, as a member of the Society of Friends, commonly called Quakers, is not exempt by law from executing the office, and that he cannot be excused from performing the same, without manifest injustice towards others of the inhabitants of the parish who have already served, or may hereafter be required to serve, the said office.

Mr. Theobald submitted, that upon the grounds set forth in his petition, he was entitled to be relieved from serving the office.

Burnaby for Mr. Adey, contended that the duty of the Court was merely ministerial—that it must assign Mr. Theobald to take upon himself the office—that he had been duly chosen churchwarden, and had no right in law to be exempted—that the exemptions are set forth by *Prideaux*, and that a Quaker was not among those who are excused—that the provisions of the Toleration Act, the 1st William and Mary, would be nugatory, if the person who has scruples is to be excused altogether from serving;—but that act was imperative. In its terms it enacted, that “if any person *dissenting from the Church of England*, shall be chosen or appointed to bear the office of Churchwarden, and such person shall scruple to take upon him such

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office, in regard of the oaths, or any other matter or thing required by the law to be taken or done in respect of such office, he *shall and may* execute the same by a sufficient deputy, by him to be provided that shall comply with the laws in that behalf"—the terms "*shall and may*," are imperative; and if the Court were to excuse this gentleman, it would in effect be dispensing with an act of Parliament—that the maxim, *qui facit per alium facit per se*, had no application to the case, for that the deputy when approved of, was *de facto et de jure* the Churchwarden; as in the case of the ballot for the militia, the substitute was really the person serving; to which no objection was made by the Quakers, although the maxim that the principal was answerable for the acts of his agent, would apply more strongly than in the present case. But, supposing this gentleman's scruples extended so far, still the other alternative was left, and to which no reference whatever was made by him in the act on petition, namely, to pay thirty pounds in relief of the poor rate, and which other parishioners had paid. If Mr. Theobald were altogether excused, it would be unfair and unjust to the rest of the parish.

JUDGMENT,

Dr. *Phillimore*, The present question arises with respect to the eligibility of a person to serve as Churchwarden, in the parish of Allhallows, London Wall. It is an application on the part of the Churchwarden, regularly chosen, and who has taken upon himself the exercise of the office, in the name and on the behalf of the parish, to compel the other person, who has been chosen a Church-

warden, who is a member of the Society of Friends, to take upon himself the functions of the office. There is no question as to the competency of the vestry, or as to the mode in which the Churchwardens were elected. The sole point at issue is, whether I shall compel the party thus brought before the Court, to take upon himself the discharge of the office.

When the question first came to the view of the Court, and I was called upon to assign the party to take upon himself the office, I confess I felt startled at the proposition. I felt that not only the person proceeded against, but that an Ecclesiastical judge, might justly entertain scruples with respect to such a proceeding; and with that view, I was willing to give the parish an opportunity of reconsidering the question, and of reflecting, whether the choice they had made was a judicious choice. I am disposed to hold a strong opinion, from my experience, which has been pretty long, of the Churchwardens of the metropolis, that the duties of this office are least adequately performed, where they are exacted from persons of different religious persuasions from the Established Church; persons so circumstanced do not perform these functions with the same spirit and zeal, as those who are members of the Established Church. The parish have reconsidered the question, and persist in calling upon me to compel this person to take upon himself the office of Churchwarden. Mr. Theobald has stated his objections in an act on petition, the parish have replied to them, and Mr. Theobald has put in a rejoinder; an affidavit has been made by the vestry-clerk, confirming the allegation, that this gentleman

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was duly elected, and has refused to assume the office of Churchwarden, and this is the evidence on which I am to decide the question.

In the first place, it seems to me extremely injudicious in members of the Established Church, to compel persons, whose religious principles are so well known as this gentleman's are, to discharge duties, which all who take upon themselves the office of Churchwardens are bound to do; and for this reason, I have been anxious to look out any authority on the point—any authority that is, in which any Court, *in a contested suit*, has compelled a Quaker to take upon himself the execution of such an office. I am not aware of any such authority, and I must therefore take the case as one *primæ impressionis*. I have been reminded that several persons of this gentleman's persuasion have taken upon themselves this office, and undoubtedly my own recollection furnishes me with several examples to that effect. But it has always appeared to me an extraordinary anomaly, that dissenters should be constituted 'the guardians and keepers' of our Established Church (for thus they are termed by high authority), (a) and take upon them an office like this, with the functions belonging to it, so closely and intimately connected with our church. There are various duties of the office of a Churchwarden, pointed at and enjoined by the Ecclesiastical law, which this person could not perform. Many of the canons of 1603; the 19th, 50th, 52d, 80th, 83d, 84th, 85th, 109th, 110th, 111th, 112th, prescribe duties to a Churchwarden, which it would be incompetent for a Quaker to perform: such, for

(a) 1 Blackstone, p. 394.

instance, as the preserving order during Divine Service; and there are duties also prescribed by the Rubric as attached to the office of Churchwarden, and implying even the necessity of their presence at the administration of the Sacrament itself, which it is utterly impossible for this person, with a strict adherence to conscience, to perform. There is an old case in 1st *Levinz*, p. 196, *Hill v. Fleurer*, in which a Churchwarden was tried for an assault, for pulling off the hat of a person during Divine Service. In the report of the case, it is said, that the justification was, that the party proceeded against was guardian of the church, and that was held to be good, that a Churchwarden was justified in preserving decorum during Divine Service, for the reporter says, how could he act as guardian of the church, and bound to present offenders to the Ecclesiastical Court, if he permitted any one to be guilty of this irreverence and indecency during Divine Service. But a Churchwarden of the sect in question, would not only not take off the hat of another person, but it would be part of the formal discipline of his caste, to wear his own. But looking to *Prideaux*, who has been cited for another purpose at the bar, he thus details the duties of a Churchwarden. ‘By the duties of his office, he is obliged to be present in the parish church, of which he is Churchwarden, on all Sundays and holidays, to take notice of the absence of such parishioners as do not come to the said church, in order to present them for the same; and also to take care that no disorder be committed in the said church or churchyard during Divine Ser-

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vice and sermon, and that all things be kept in order and quiet.

In my search for cases, I find a case decided by Sir William Scott, in 1789, the case of *Anthony v. Seger*, (a) in which, the question was not the same as this, but the question was, whether an alien-born could be compelled to serve the office of Churchwarden. Sir William Scott there held that offices the most ministerial, left a discretion to the judge not to join in an illegal act; and he illustrated this by saying, 'that if a parish were to return a Papist, or a Jew, or a child of ten years old, or a person convicted of felony, he conceived the ordinary would be bound to reject such a person.' Now, what do I collect from this case? that in the judgment of Sir William Scott, if the person presented by a parish, should be a Papist or a Jew, the ordinary would not compel that person to perform the duties of the office, and I should like to know the distinction between a Roman Catholic and a Quaker, or why even a Jew might not be liable, if it were a matter of course that he might serve by deputy?

It has been said, that I am bound by the Toleration Act to compel any dissenter who may be chosen by the parish to serve this office. It is true, that the statute referred to allows dissenters to act by deputy, but I am yet to learn, how such a permission is to be construed as compulsory upon the ecclesiastical judge, to admit all dissenters, of every description, to the discharge of this office.

(a) 1 Consist. Rep. p. 9.

Such a construction would be totally irreconcilable with the dictum of Lord Stowell, with respect to Papists and Jews, in the case of *Anthony v. Seger*.

Again ; it has been argued that *Prideaux* has not inserted Quakers in the list of those persons who are not liable to fill this office : but in the enumeration given by *Prideaux*, we do not find an alien, a Jew, or a Papist. What then do I infer from this ? That there may be cases, in which there is a discretion in the Court, whether it shall feel itself called upon to enforce the performance of these duties. The obligation is not compulsory on all. I must not be understood to say, that all dissenters are exempted, or to specify whether any, and if any, what class may be exempted. If that question comes before me; it will then be time to distinguish between the cases, according to circumstances and facts. Far be it from me to allow any assumption of a religious cloak, to prevent persons from discharging a legal obligation ; but the Society of Friends are known ; they are a marked and peculiar caste—are privileged even as to their exemption from the forms of marriage, enjoined by the legislature—their tenets, doctrines, and habits, are recognised to be such, as to make it impossible to consider that they can discharge the duties of Churchwarden. Having the means of knowing the conscientious scruples of this sect, a judge of an Ecclesiastical Court ought seriously to pause, not only before he attempts to violate the religious scruples of this class of persons, but also for the purpose of asking himself, whether he can conscientiously admit into the bosom of our church, persons who are disqualified from obeying her

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sanctions and giving full force and effect to her institutions and ordinances.

Upon the whole, from the best consideration I can apply to the case, I have come to the determination, that the parish must proceed to the election of some other person, as I will not compel this individual to serve the office. And consequently I dismiss Samuel Theobald from further observance of justice in this case.

PREROGATIVE COURT OF CANTERBURY.

CROWLEY *and* SHARMAN *against* CHIPP *and* TUBB.

On Petition.

MICHAELMAS
TERM,
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3rd Session.

IN this case John Chipp and Daniel Tubb, the sureties in the administration bond of Catherine Tubb, the widow and administratrix of Charles Tubb, deceased, were cited to show cause why the bond should not be attended with, and produced as might be requisite or necessary in certain proceedings alleged to have been commenced in the court of Common Pleas, by Crowley and Sharman creditors of the deceased against them, for an inventory and account of the personal estate and effects of the said Charles Tubb. It was alleged in the decree that the said Charles Tubb was at the time of his death indebted to Crowley and Sharman in the sum of £403. 7s. 1d. and that in the month of November, 1832, they, on behalf of themselves,

and the rest of the creditors of the deceased, filed their bill of complaint against the administratrix for an equal distribution of the effects of the said deceased, and that the usual process of subpoena issued against her to appear and put in her answer to the said bill, but that she had quitted her residence and could not be discovered, so that the subpoena could not be served, and that in consequence thereof the action was brought in the Common Pleas against the said sureties.

An appearance was given to this decree by Chipp and Tubb, and an act on petition was entered into, in which they denied that the widow had evaded the service of the subpoena; and they set forth her residences and places of abode since her husband's decease, and submitted that it was contrary to the law and practice of the Court to permit the bond entered into by them to be put in suit against them, and for such purpose to be attended with in any Court, until proceedings had been first taken against the administratrix, to exhibit an inventory of the goods, chattels, and credits of the deceased, which had come to her hands, possession, or knowledge, and to render a just and true account of her faithful administration thereof; as by the production of such inventory and account, it would probably appear that no breach of the bond had been committed.

In reply to this, it was submitted, on behalf of Crowley and Sharman, that as the administratrix had not exhibited an inventory and account *within the time assigned by the bond entered into by her at the time of granting the administration* of the goods of the deceased, a breach of the said bond had actually been committed, and that they were en-

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The Court will not, on the mere non-delivery of any inventory within the time assigned by the bond, and without calling on the administrator to bring in such inventory, permit an administration bond to be attended with for the purpose of being put in suit at law.

titled to have the bond attended with in any action for such a breach. On a former day (the 6th of May)

SIR HERBERT JENNER,

After reading the act on petition, and stating that it appeared to him that if due diligence had been used, the widow might have been found; proceeded: The question then is, whether,—as the administratrix has not given in an inventory at the time assigned her, no proceedings having been instituted against her for the purpose of calling for that inventory—the Court will, without entering at all into the merits of the case, direct the bond to be attended with for the purpose of being sued upon at law. It has been contended, that it is the duty of the Court so to deliver out the bond, and the case of "*the Archbishop of Canterbury against House*," (a) was relied upon to show that a creditor has a right to sue upon the bond, and that the Court ought *ex debito justitiæ* to permit the bond to be attended with for the purpose of its being put in suit; but I do not think that such is the result of that case; there, a motion was made to stay the proceedings in an action upon an administration bond, so that the bond had been delivered out, and the grounds for staying the proceedings were that the creditor (the party suing in that cause) had no authority from the Archbishop; and, secondly, that it was not competent to the Archbishop to depute such authority to a creditor.

As to the first point, the fact was disproved, and Lord Mansfield commenced his observations with

(a) Cowp. 140.

saying, "What the object of the administratrix was in this case is very manifest upon the affidavits that have been read: namely, to sell the administration to the creditors. But failing of that purpose, after having obtained the administration she makes use of all sort of chicane, delay, and false pleas, to defeat the creditors, and at length absconds." So that there never was a stronger case than that against the administratrix, and the application was made on her behalf to stay the proceedings. Lord Mansfield went on to say, "that he knew of no authority which says that the Ordinary cannot empower a creditor to put the bond in suit. On the contrary, he says it is *ex debito justitiæ* that he ought to do so." Certainly where a case is made out. What I apprehend to be decided by this case is, that the Archbishop has the power to allow an administration bond to be sued upon in his name, and that a creditor has as much right to put the bond in suit as a next of kin; that was the case which was principally relied on, and it occurred in 1774, but the authority of that case is somewhat shaken by the case of "*Thomas against the Archbishop of Canterbury*" (a), which was decided in 1787. The marginal abstract, which appears to be correct in that case was this: "An
 "administratrix entered into the usual bond in the
 "Prerogative Court to exhibit an inventory within
 "a limited time. The time having elapsed without
 "an inventory being exhibited, a creditor put the
 "bond in suit in the name of the Archbishop. The
 "administratrix filed her bill for an injunction, which

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(a) 1 Cox. 399.

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“ was granted, on the terms of her giving judgment
“ in the action, which was to stand as a security for
“ the costs at law and in equity (but not for the debt),
“ and amending the bill by submitting to account.”

The impression of Lord Thurlow clearly was, that the Spiritual Court had a discretion in the matter, and that it would not permit the action to be brought if the executor could show that he was not culpable ; but he said the Temporal Courts had interfered. I am not, however, aware of any case in which a mandamus has been granted from the Court of King's Bench. The whole of the cases on this point were discussed in the case of “ *the Archbishop of Canterbury against Robertson*” (a), in which case the bond had been attended with, and nominal damages recovered as to the non-delivery of an inventory. Mr. Baron Bayley, in that case, seemed to be of opinion that the Ecclesiastical Court might limit the breaches to be assigned, (b) but not finding it stated in any of those cases that the power of this Court is limited, it is material to see what has been the practice here.

In all cases before the bond has been delivered out, the party has been called upon to show cause.

Lushington.—I put it that the Court would see whether there had been any breach of the bond, and if so, that it would then order the bond to be delivered out without considering what might be the consequences in a court of law.

(a) 1 Crom. & Mees. p. 390 ; 3 Tyrwh. p. 390.

(b) 3 Tyrwh. S. C. in *notis*, p. 419.

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But in many cases the Court has refused to deliver out the bond where no inventory had been exhibited. I should be extremely unwilling in any case upon the mere non-delivery of an inventory to allow the bond to be attended with, and in the present case strong grounds existed for not calling for the inventory, as proceedings had been instituted in the Court of Chancery.

The Court declined to make any order until the parties should have cited the administratrix to bring in an inventory.

The widow afterwards brought in an inventory, and this day,

Addams submitted that there were no grounds whatever for the proceedings in this case, that the widow in effect had given an inventory by passing her account at Somerset House; that the other parties knew that the estate was insolvent; and when the act on petition was gone into on a former day, the Court said that the parties ought to have called upon the widow to exhibit an inventory, which they have not done; but the widow, of her own accord, has since brought in the inventory, and he prayed that his parties might be dismissed with their costs.

Lushington, contra.—When the proceedings commenced, the widow had not exhibited an inventory which the sureties engaged that she should do; upon the admitted facts then of the case there was sufficient ground for coming to the Court, no inventory had been exhibited, and the

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parties were not dismissed, but were held before the Court, in order that the widow might bring in the inventory, and the effect of that inventory might be seen.

SIR HERBERT JENNER.

Courts of common law having been of opinion that the non-delivery of an inventory constitutes a breach of the administration bond, creditors of the deceased have a right to see the inventory exhibited. I cannot, therefore, say that the parties shall not come here for the purpose of calling for the inventory. No inventory had been exhibited in this case in the first instance, but that has since been done; I cannot hold that the parties in this case, therefore, had no grounds for instituting these proceedings. I shall dismiss the parties, but make no order as to costs.

CONSISTORY COURT OF LONDON.

GREENHILL *against* GREENHILL.

On Petition.

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In this case a sentence of separation had been pronounced in favour of Henrietta Lavinia Greenhill against Benjamin Cuff Greenhill, her husband, by reason of his adultery, and alimony had been allotted. A monition having been taken out against the husband to compel payment of that alimony, an appearance was given to the monition under *protest* by the husband, and an act on petition

was entered into. It was alleged on the part of the husband that he had three children, all of whom were in their infancy, that shortly before the institution of this suit, the children were removed from Weymouth, where they had been residing with their mother, the said Henrietta Lavinia Greenhill, to the residence of Mrs. Macdonald, her mother; that they had been so removed by Mrs. Greenhill without the knowledge and consent of the husband, and contrary to his intentions with respect to the custody of the said children; that he thereupon applied to the Hon. Mr. Justice Patteson, one of judges of the Court of King's Bench, for, and obtained a writ of habeas corpus for the delivering up of the said children to him. That the writ having been served on Mrs. Greenhill, she appeared thereto, and that an order was made that she should deliver up the children to her husband. That pending the said application for the habeas corpus, a bill was filed on behalf of the children, and a petition was presented to the Vice Chancellor, praying that a fit and proper person should be appointed guardian of the children, but that the Vice Chancellor, after hearing counsel upon such petition, decided that there was no ground for the interference of a Court of Equity with respect to the custody of the said children, and refused to grant the prayer of the petition for the appointment of a guardian to them.

That the order made by Mr. Justice Patteson for the delivering up of the children, was made a rule of the Court of King's Bench, and the same having been duly served on the said Henrietta Lavinia Greenhill, she refused to obey the same, and applied

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to the Court of King's Bench, and obtained a rule to shew cause why that order should not be rescinded ; that on the refusal of Mrs. Greenhill to comply with the said order, Mr. Greenhill, the husband, obtained a rule from the Court, calling upon her to shew cause why an attachment should not issue against her for a contempt of Court ; that attempts were made to serve her with the said rule, but that she having previously taken the children from the custody of Mrs. Macdonald into her own custody, secreted herself and kept out of the way, for the purpose of avoiding the service upon her of the said rules, and that the same could not be served. That a special application having been made to the Court of King's Bench for the purpose, the rule for the attachment was brought under the consideration of the Court without a personal service, and at the same time also, the rule obtained by Mrs. Greenhill, to shew cause why the order made by Mr. Justice Patteson should not be rescinded, was considered by the Court,—that while the same were pending, and before they could be heard, the utmost endeavours were made by Mr. Greenhill and his solicitor and agents, to ascertain to what place Mrs. Greenhill had removed herself and her children, and offers were made by the husband, (which reached the wife) to make such arrangement respecting the custody of the said children as should leave Mrs. Greenhill ample opportunities of free access to them, which offers were absolutely rejected. That in January last she left this country, and took with her the said children, for the purpose of avoiding the attachment against her for contempt. That the questions arising upon the aforesaid

rule of Court were argued, and the rule for the attachment against her was made absolute, but the attachment was to remain in the office one month, in order to afford her an opportunity of complying with the same, or of making some arrangement. That the said order has not been complied with; that Mrs. Greenhill and the children are now abroad, but at what place is unknown to the said Mr. Greenhill. That the order for attachment issued, but in consequence of her absence from the country cannot be served upon her; and it was submitted on behalf of the husband, that under the circumstances stated, Mrs. Greenhill was not entitled to have the payment of the alimony allotted to her in this Court enforced against him.

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Addams and *Nicholl*, submitted that sufficient was set forth to justify the Court in not enforcing the monition; the wife has illegally taken possession of the children, and contumaciously refuses to comply with the order of the Court of King's Bench, and is in contempt. She now comes to this Court to ask for funds to enable her to evade the laws of the country; would not the Court, by complying with her prayer, be accessory to a fraud upon the other Courts?

The *King's Advocate* and *Daubeny*, *contra*.—

DR. LUSHINGTON.

In this case, a suit was originally brought by Mrs. Greenhill against her husband for a separation, by reason of his adultery, and the Court was of opinion that the charges were proved against him,

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contempt of the
Court of King's
Bench, and is
resident out of
the country, in
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and pronounced a sentence of separation, and alimony was allotted to the wife. The Proctor of the wife has endeavoured to enforce payment of that alimony, and an act on petition has been entered into on behalf of Mr. Greenhill, alleging facts said to be sufficient to induce the Court to withhold the exercise of its power to compel the payment of the alimony. Under ordinary circumstances, it is the usual course of the Court, *ex debito justitiæ* to enforce obedience to decrees already made. As a ground for departing from the accustomed practice, it is alleged that these parties have three children, that Mrs. Greenhill has taken possession of them, and has removed them out of the country; that the right to the possession of the children is in the husband, that he has obtained an order from the Court of King's Bench, directing her to deliver up the children to him; that Mrs. Greenhill petitioned the Court of Chancery to appoint a guardian to the children, and that her application was rejected; that she has removed out of the jurisdiction of the Courts of this country, and contumaciously refuses to obey the order of the Court of King's Bench; and it is said that I ought under these circumstances to decline to enforce the monition.

I am not aware that such an attempt as this was ever before made, and the Counsel for Mr. Greenhill, when I asked for some precedent, were unable to state any authority in support of the application. The absence of all authority of anything approaching to a precedent would alone make it the duty of the Court to pause before it took upon itself to stay the ordinary course of its judicial process, and to introduce a new principle to govern its proceedings.

I must at least be satisfied that if no such case has occurred, the subject matter falls properly within the cognizance of ecclesiastical tribunals. But is this so?—Does the conduct of the husband or the wife, with respect to the children in any degree belong to this Court? I apprehend not; all that I am to determine is between the husband and wife, with respect to each other, the allotment of alimony is incidental and necessarily incidental to such jurisdiction. It is no part of my duty to consider, and I have not a shadow of authority to determine, whether the wife is or is not to have the custody of the children: the whole matter as to the care and custody of children belongs to another jurisdiction. In a case before the late Judge of the Arches Court he refused to make any deduction in the amount of alimony; on account of there being a child in arms under the wife's care; his reason being that so far as his authority extended he would not aid the husband in taking so young a child from an innocent wife; and in this case I am at a loss to know why I should, by starving an innocent wife, compel obedience to the orders of other tribunals to render up to the guilty husband the offspring of that union, the obligations of which he has grossly violated. Suppose this lady had a separate income, it is not maintained that the Court of Chancery would stop the payment of that money to her for the purpose of compelling obedience to an order of the Court of King's Bench, and why should alimony stand on a less favourable foundation? I shall not go into the question whether the husband has offered a proper asylum for the children, the question is foreign to the duties of my office, I shall,

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therefore, overrule the protest and direct the money to be paid, and make an order under the recent act of Parliament (2 & 3 Wm. 4, c. 93,) but before I make that order I should wish to be informed, whether counsel have sufficiently considered the provisions of the act. Before I make my order under the act, there must be an attempt to enforce an order of the Court, a contempt, and an exemplification, and it forms a consideration with me in deciding this case, that if this be the result the Court of Chancery may refuse to enforce the sequestration, and so exercise a jurisdiction if it think fit.

The return of the officer who served the monition was read, stating that he had attended at Aberdeen Place, Marylebone, on the 1st of June, to serve the monition, that he found the house was to let furnished; that upon inquiry of a female in the service of Mr. Greenhill he was informed he was out of town and would not return for six months, and that she did not know his place of abode in the country; that he read the monition to her and left a copy; that he proceeded to Mr. Greenhill's solicitors', who told him he was not there, but declined to give any information as to where he was, and that he (the officer) left with him a copy of the monition.

The *King's Advocate* referred to the 2nd sect. of 2 & 3 Wm. 4, c. 93, and contended that there had been a sufficient service to justify the Court in signifying the contempt of the party. The only

case that has occurred since the passing of the act was that of *Hinxman* against *Hinxman*, in which there had not been a personal service but by ways and means; that was a proceeding to enforce the payment of alimony *pendente lite*; the party could not be personally served, the instrument was stuck up at the Royal Exchange, and on the chapel where Mr. Hinxman was in the habit of officiating, and the Court, considering that Mr. Hinxman must have had cognizance of the proceeding, pronounced him contumacious, and a *significavit* issued.

In this case now before the Court the party had not been personally served, but the monition had been served at the house, and a Proctor had appeared for him.

DR. LUSHINGTON.

If I could see that the service had been really evaded I should have no hesitation in pronouncing the party in contempt, and signifying it. I now overrule the protest and direct that the money shall be paid; but as the party had appeared to the monition I shall let the matter stand over until the next Court day: in the mean time another monition might be taken out if the party thought proper.

Another monition was accordingly prayed, and on the first session of Hil. Term (17th Jan.) 1837, the return having been read, the Court, after stating that it appeared by the return that every attempt had been made to serve the monition, pronounced Mr. Greenhill in contempt, and directed the exemplification to issue to the Court of Chancery agreeably to the act of Parliament.

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ARCHES COURT OF CANTERBURY.

The Office of the Judge promoted by
TAYLOR against MORLEY.

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2nd Session.

*TAYLOR
against
MORLEY.*

In this case, the Rev. George Morley, the vicar of Newport Pagnell was cited, by letters of request from the commissary of the archdeaconry of Buckingham, at the instance of William Taylor, one of the churchwardens of the said parish, to answer to certain articles, &c., “and more especially for quarrelling and brawling in the parish church of Newport Pagnell aforesaid, and for insulting, disrespectful, and disobedient conduct towards the Archdeacon and Commissary of Buckingham in the said church; and for preaching a sermon in the parish church aforesaid, in which sermon the conduct of the said Archdeacon was improperly animadverted upon; and for writing and sending a letter abusive of his behaviour and conduct.”

An appearance having been given for Mr. Morley, the articles were brought in, pleading,

The *First*, Mr. Morley’s institution to the vicarage of Newport Pagnell, on the 28th of June, 1832, and his induction subsequently.

The *Second* exhibited a copy of the act of institution made in the muniment book kept in the registry of the Bishop of Lincoln.

The *Third*, That at a visitation held by the

Venerable and Reverend Justly Hill, Clerk, Master of Arts, Archdeacon of the Archdeaconry of Buckingham, and Commissary of the Bishop of Lincoln, in the parish church of Newport Pagnell, aforesaid, on Saturday, the 30th of May, 1835, &c. ; the clergy of the said archdeaconry were first called, and having severally answered to their respective names, the greater number of them then left the Court ; but that the said George Morley, the vicar, remained in his gown and bands, and stationed himself close to the rails of the communion table in the chancel of the church, and as near as possible to the archdeacon, that the Churchwardens of the said archdeaconry were then called and sworn ; and upon the Churchwardens of the said parish of Newport Pagnell being called, an inhabitant of the said parish preferred to the Archdeacon a complaint against them, concerning a pew or seat in the said parish church, that the Archdeacon having received and heard such complaint proceeded to state the nature of the law relative to church seats to the said complainant ; and that in the course of his so doing, the said George Morley many times interrupted him by observations and remarks impertinent and improper, although repeatedly requested by the Archdeacon not to interfere in the proceedings ; that the Archdeacon at length stated to Mr. Morley that after he should have explained the law of the case to the said complainant, he would willingly hear anything he might wish to say, and, that accordingly having concluded, explaining the law as aforesaid, he informed the said George Morley that he was ready and willing to hear him ; that, thereupon the said

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George Morley, in a violent, disrespectful, and insulting manner, proceeded to address the Archdeacon upon the subject of the said complaint and his aforesaid explanation of the law of the case, and declared to the Archdeacon, amongst other things, that he knew nothing of the matter and that he would enlighten him; and that the said George Morley, then and there, without regard to the sanctity of the place, made use of many other improper and offensive expressions derogatory to the dignity of the said Court; that the Archdeacon, at length, in consequence of the impropriety of Mr. Morley's manner and language, admonished him upon his canonical obedience, to refrain from continuing such, his interruption, and informed him that if he refused to do so, he must leave the Court; that Mr. Morley, thereupon put himself into an outrageous and violent passion, and exclaimed, "If there is not justice to be done, I shall leave the Court; this man has been most unjustly dealt by," or used words to the very same effect, and then departed from the said Court.

The *Fourth*, that within a very short time after Mr. Morley had quitted the said Court he returned into the same without his gown and bands, and was approaching the rails of the communion table with much insolence in his manner and bearing, when the Archdeacon addressed him, and stated that he could not allow him to remain there unless he would apologize for his conduct and language, and promise that he would not further interrupt the proceedings of the said Court, but that Mr. Morley then addressing himself to the archdeacon, exclaimed in a violent and passionate manner, "If I

have been guilty of contempt of the Court, I will apologize, but I deny your authority, or that of any man, to remove me from my own church, and I defy you to do so," or used words to the very same effect, and several times repeated the said words, "I defy you;" and also used many other expressions of defiance, and accompanied the same with violent and offensive gesticulations and manner, insomuch that the Archdeacon was induced, for the decorous despatch of business, and with a view to maintain the dignity of the said Court, and preserve the sanctity of the place, to order, and did accordingly order, the officers of the said Court and the Churchwardens to remove him from the said Court, and that Mr. Morley was accordingly, but quietly, and without violence, removed by them from the said Court.

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The Fifth, that on the day next following the visitation aforesaid, Mr. Morley, in a sermon preached by him, after the Morning Service in the parish church of Newport Pagnell aforesaid, taking for his text, the 25th, 26th, and 27th verses of the 29th chapter of Proverbs, namely, "The fear of man bringeth a snare; but who so putteth his trust in the Lord shall be safe.

"Many seek the ruler's favour, but every man's judgment cometh from the Lord.

"An unjust man is an abomination to the just; and he that is upright in the way, is an abomination to the wicked."

Did amongst other matters, in an excited and unbecoming manner, inveigh against the conduct of the said Archdeacon, and make remarks and observations

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with evident allusion to the transactions mentioned and set forth in the two next preceding Articles.

The Sixth, That the Archdeacon having in consequence of such, the conduct on the part of Mr. Morley, as hereinbefore set forth, considered him unfit to hold the office of one of his surrogates, and having withdrawn his appointment as such accordingly, Mr. Morley did, on or about the 29th of June, 1835, write, address, and send a letter to Edward Prickett, of Aylesbury, the Register of the Archdeaconry Court of Buckingham, and which was duly received by him, wherein Mr. Morley did express himself in ironical, and highly disrespectful, and unbecoming terms of the Archdeacon, his lawful canonical superior.

The Seventh, exhibited the letter, and pleaded it to be in Mr. Morley's handwriting. (a)

(a) The letter was as follows:—

Vicarage, Newport Pagnell, June 9th, 1835.

SIR,

The Venerable, the Archdeacon of Bucks, is at full liberty to wreak his vengeance on me, in any way that he may judge will most redound to his dignity and glory, and best promote that subservient respect to his person, which he so anxiously and strenuously demands.

The Archdeacon is remarkable for exhibiting every courteous and Christianlike grace, becoming a minister of the "meek and lowly" Jesus, and is a pattern to the clergy of the county of Buckingham, of rendering good for evil, and of doing unto all men as we would they should do unto us.

I return you six blank licenses with the certificates, and you will be so good as to pay the cost of them into Messrs. Rickford and Sons' Bank, to my account.

I am,

Your obedient Servant,
 GEORGE MORLEY.

(Superscribed)

Edward Prickett, Esq., Aylesbury.

The others were the usual formal Articles.

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The admission of the Articles was opposed, and the judge rejected the *Fifth*, *Sixth*, and *Seventh* Articles. A negative issue was given by Mr. Morley, and witnesses were examined to prove the Articles; and subsequently a defensive allegation was brought in on behalf of Mr. Morley, pleading,

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First.—That sometime previous to the visitation, Daniel Goodman, a respectable parishioner of the parish, was ejected by the then Churchwardens from a pew in the church, to the possession of which he conceived that he had a just and legal claim or title. That the wife of the said Goodman, by his direction, wrote to the Archdeacon, complaining of the conduct of the said Churchwardens. That the Archdeacon wrote in reply to Mr. Goodman, promising to investigate in person the subject of such complaint at his next visitation, and in the meantime recommending Goodman to apply for advice and assistance to Mr. Morley, the Vicar; that Goodman did accordingly apply to Mr. Morley, and requested him on the day previous to the visitation to state on his (Goodman's) behalf the grounds on which he conceived himself entitled to the use of the pew, he Daniel Goodman being distrustful of his own power to explain his case intelligibly at the visitation.

The *Second* exhibited the Archdeacon's letter.

The *Third* denied the *Third* and *Fourth* Articles of the libel to be true, and pleaded, in contradiction, that the visitation having been held, and the clergy dismissed, Mr. Morley continued sitting on the bench outside the communion rails, where he and others of the clergy had been sitting up to the time of their dismissal, being the same seat which he had

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occupied on previous visitations since his induction. That on the Churchwardens of Newport Pagnell being called, the Archdeacon (producing at the same time a letter from his pocket,) said "I have received a letter about a pew from some man or other, it is a long letter, and I can't make much of it;" and added, "Can you tell me anything about it?" appealing to William White, one of the said Churchwardens; that the said White replied, that "the pew was empty, and that they (meaning himself and his co-Churchwarden) had given possession of it to another parishioner." That the Archdeacon then said, "I see, I see, I dare say it's all right, but it is as well to have this man, Goodman, (I think is his name,) up, and hear what he has to say." That Mr. Morley upon this stood up, and addressing the Archdeacon, was about to state that Goodman had requested him to explain the circumstances under which he conceived the pew was not a vacant one, but that Goodman had a claim of right to the use or possession of it; but was immediately ordered by the Archdeacon to sit down and not interrupt the Court. That Goodman was then questioned, but soon became so confused as to be unable to explain the circumstances connected with the said pew. That there being a momentary pause, Mr. Morley again rose, and requested permission to state the said Goodman's case, but was again desired by the Archdeacon, with much austerity of tone and manner, to sit down, and was told that if he again interrupted the proceedings of the Court, he (the Archdeacon) would have him removed. That Morley having, though provoked at such, the annoyance of the Archdeacon, resumed his seat, the

Archdeacon proceeded to lay down the law on the subject of pews, in churches generally, incidentally whilst so doing, deciding the point at issue against Goodman, and concluded, by stating that it was "all right," and that the Churchwardens had done their duty. That whilst so incidentally deciding the case Morley did not interrupt the said Archdeacon with any remarks whatever, nor up to such time did he at all interfere, save as aforesaid. That the tone and manner of Morley in requesting to be heard on behalf of Goodman was perfectly proper and respectful, and that when told to sit down, a second time, and not interrupt the Court, on pain of being turned out of his own church, he, however provoked, sat down without making a single remark.

The *Fourth* pleaded, that after the Archdeacon had concluded his statement, (and during which he received no interruption from any one,) he added, in a sneering and sarcastic tone and manner, "and now we will hear what Mr. Morley has to say." That upon this Mr. Morley arose, and by way of prefacing what he was about to observe, said, "If you will condescend, Mr. Archdeacon, to be enlightened by me on the subject." That no sooner had the term enlighten fallen from him, than the Archdeacon broke forth "Enlighten your Ordinary, Sir!" That Mr. Morley replied, "I have no intention to offend you, Sir, or the Court, my object is simply to throw a light upon the case," or to that very effect. That the Archdeacon immediately upon this called upon the Churchwardens and his apparitors to turn Mr. Morley out of Court. That upon this order being given, Mr. Morley rose and left

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the church, merely saying, as he left, though extremely provoked, "I shall leave the Court, Mr. Archdeacon, without troubling these persons to turn me out of it; but I must say that Mr. Goodman has not had justice done him," or to that effect. It denied that Morley ever said that the Archdeacon knew nothing of the matter, and that he would enlighten him, or anything to that effect, or that he made use of any expressions derogatory to the dignity of the Court; and it pleaded, that in saying what he last said, his manner was not violent, disrespectful, or insulting, nor making allowance for some natural warmth occasioned by the Archdeacon's ordering him to be turned out of his own church as aforesaid, in any respect different from his usual and ordinary manner.

The *Fifth*.—That about a quarter of an hour after Morley left the church, he returned thereto, without his gown and bands, as pleaded in the Articles, the clergy having been long previously dismissed, and there being at such time several other of the clergy without their gowns and bands in the church; and it pleaded that while Mr. Morley was proceeding up the aisle, walking in his ordinary gait and manner, when ten or twelve yards from the communion table, the Archdeacon called out in a loud tone of voice, "I will not suffer you to remain there unless you make an apology." That Mr. Morley replied, "I am sorry that you should imagine I have shewn any disrespect to you, Mr. Archdeacon, as that was not my intention." That the Archdeacon immediately rejoined in a sharp and angry tone of voice, "Then make an apology, Sir, or I shall have you removed." When Mr. Morley

said, addressing himself to the Archdeacon, "I apologize to you, Mr. Archdeacon, for any words that I may have used derogatory to you, in your official capacity, or to your Court, though I must be permitted to say that I have not been civilly treated;" that the Archdeacon immediately called upon his apparitors and officers to turn that person, (thereby meaning Mr. Morley,) out of the church; that Mr. Morley then further said, addressing the Archdeacon, but not in a violent and passionate manner, or with greater warmth than such conduct and language would naturally provoke in any one, "I am not prepared to say decidedly, but I think I might defy you to turn me out of my own church;" that the Archdeacon, upon this, immediately repeated his orders to turn that person out of the church, whereupon Mr. Morley was not removed as pleaded, but at the solicitation of his friends and others, was induced to leave, and did leave the church quietly of his own accord; and it pleaded that Mr. Morley did not use the words "I defy you," more than once, or at any other time, or in any other manner than as aforesaid; that he did not make use of any other words of defiance; that what he said was not accompanied by violent and offensive gesticulations as pleaded.

This allegation was admitted without opposition, and witnesses having been examined in support of it, the cause came on for hearing, and was argued in Mich. Term, 1836.

Lushington and *Curteis* were heard in support of the Articles. *Addams* and *Lee*, *contra*, and on this day judgment was delivered.

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—
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—

Articles against
a clergyman
for quarrelling
and brawling,
and for insult-
ing, disrespect-
ful, and disobe-
dient conduct
in the church,
being only in
part proved,
the Court
monished him
to be more
careful, and
condemned
him in 75*l*.
nomine expen-
sarum,

SIR HERBERT JENNER,

After stating that considerable delay had occurred in the proceedings of the cause, and which, he understood, had been occasioned by a desire that the matter might be compromised, and that he regretted that such had not been the result, proceeded. In the first place then, I will consider what was the substance of the charge as originally brought. The citation called upon the defendant to answer to certain articles, more especially “for quarrelling and brawling, and for insulting, disrespectful, and disobedient conduct in the church; and for preaching a sermon, in which the conduct of the Archdeacon was improperly animadverted upon; and for writing and sending a letter abusive of the Archdeacon’s conduct;” upon the return of this citation an absolute appearance was given for Mr. Morley, so that the offence charged, appeared to him, and to his legal advisers, to be one cognizable by this Court; the Articles were afterwards brought in, and considerable discussion took place, as to their admissibility, and the Court rejected the *fifth*, *sixth*, and *seventh* Articles, being of opinion that the charge of preaching a sermon, animadverting on the Archdeacon’s conduct, contained in the *fifth* Article, was not admissible, no part of the sermon being set forth, it being therefore impossible for the Court to judge what the real nature of the sermon was; and the *sixth* and *seventh* Articles were rejected, on the ground that the Court had no jurisdiction to inquire into the matters set forth, the letter written by the defendant, relating to a subject which might be purely of a civil nature.

The charges that remain then to be considered are for brawling, and for disobedient, and disrespectful words, addressed to the Archdeacon by Mr. Morley, and the Court cannot read the Articles without feeling that the charge is of a very grave description; and, if proved to the extent as laid, that it would be the duty of the Ordinary to prevent, by adequate punishment, the recurrence of such conduct in future, more particularly looking to the relative situation of the parties: and when the admission of the Articles was debated, the Court expressed itself to be of such opinion.

The party proceeded against gave a negative issue, denying the facts, but admitting the jurisdiction of the Court; but two objections have been now taken to the jurisdiction of the Court, which it will be necessary to notice, because, if either of those objections are good, it would be useless to go at all into the question as to the proofs in the cause.

An objection to the jurisdiction of the Court may certainly be taken at any time, but it is more usual, and undoubtedly more convenient, that such objection should be taken in the commencement of the proceedings.

The first objection was, that the letters of request (from the Commissary of Buckingham) ought to have been addressed to the Chancellor of the diocese of Lincoln and not to this Court, but I consider that objection entirely disposed of by the case of *Burgoyne against Free*. (a)

The other objection was a novel one, and if good,

(a) 2 Add. Rep. p. 405. See also *Hillyer against Milligan*, p. 8. Cases before Sir G. Lee.

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Letters of request from the Commissary of Buckingham go to the Court of Arches and not to the Chancellor of Lincoln.

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The Ecclesiastical Court has jurisdiction in offences of brawling independently of the statute 5 & 6 Ed. 6th, c. 4.

would dispose almost of all cases of brawling, but I always thought it the duty of the Ordinary to protect the sanctity of the church, and this, not only under the statute of Edward the Sixth, but by the general law also, the objection was, that the Ecclesiastical Court has no jurisdiction in such matters, except under the statute, and then only when the offence amounts to a constructive breach of the peace, and in support of this position, the case of *Wenmouth against Collins*, (a) was cited as an authority. In that case, a prohibition was moved for to stay a suit in the Ecclesiastical Court against Wenmouth for brawling in the belfry of the church, and striking a man there, upon the suggestion of the statute 5 & 6 Ed. 6, c. 4, and alleging that all statutes are construable by the common law, and that Wenmouth came there, as mayor, to suppress a riot; but the Court denied a prohibition, because the offence was cognizable in the Ecclesiastical Court, before the statute *ratione loci*; and though the statute provided a penalty, it did not alter the jurisdiction; surely then the Court is not prohibited from proceeding under the general law, and proceedings have frequently been taken both under the statute and the general law; and, in many cases, it is advisable to proceed under the general law, because the statute requires two witnesses in proof of the charge, while under the general law, one witness to certain words, and one to circumstances, is sufficient, and it may not always be in the power of a party to produce two witnesses in support of the specific charge; and the case of *Hutchins against*

(a) 2 Lord Raym. p. 850.

Denziloe, (a) is precise in point to show that proceedings may be taken under the statute or the general law, and it would have been an extraordinary state of the law if any quarrelling and brawling might take place in a church, unless amounting to a constructive breach of the peace, and any indecent or indecorous language might be used with impunity.

Now as the words, in this case, are charged to have occurred at a visitation, it is urged that they ought to be considered in the same way as if passing at a vestry meeting, and as was said by Lord Stowell, (b) "*that may be chiding or brawling in the church, which would not be so in the vestry,*" but I cannot look upon a visitation in the same manner as a common vestry meeting; a visitation is a much more solemn meeting, it is preceded by prayers, (and in this case, Mr. Morley himself read those prayers,) and great decorum is required, although it is of common occurrence, that questions of a civil nature do arise; those relating to rates, repairs, or church seats, and undoubtedly some degree of earnestness of manner is allowable, and the present question is, whether, under the circumstances of this case, Mr. Morley's conduct was such as to render him liable to ecclesiastical censures.

Much has been said as to the Churchwarden being the party who prosecutes this suit, but he is the fit and proper person to keep order and decency in the church, and in this case the Archdeacon could not himself promote the suit; therefore, I

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(a) 1 Cconsist. Rep. p. 181.

(b) 1 Consist. Rep. p. 185.

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MORLEY.

In criminal
suits the articles
should state
the whole
transaction, in
order that the
defendant may
give an affirma-
tive issue.

think, if the Churchwarden is proceeding of his own accord, that there is nothing objectionable in his so doing; but it has been much pressed upon the Court, that the Archdeacon is the real promoter in this case, and evidence has been adduced on the point, and it is impossible on the whole *res gestæ*, not to be satisfied that such is the fact: but this would make but little difference, if the offence charged in the Articles be proved against Mr. Morley; although, it is possible, that the conduct of the Archdeacon may have considerable bearing as to the question of costs, and in cases of this kind the question of costs is one of material consequence. I will now proceed to consider the facts of the case; I am sorry to see that the evidence in the cause runs to a very great length, and from the length of time which has elapsed from the date of the transaction to the time when the witnesses were examined, they speak with great looseness as to the circumstances, and great variation occurs in the accounts given by the different witnesses. It is proper that I should observe that in cases of this description the Articles ought to state fairly and candidly the whole transaction, not only is this due to the Court, but it is just to the defendant also, as he might at once admit the facts to be true; but I must say, looking at these Articles, that they set forth, from the very commencement, a very aggravated and inflamed account, and which, if true, would be indecent in the extreme; but, upon looking at the evidence of the witnesses on one side and the other, it is quite clear that Mr. Morley was not actuated with any desire to insult the Archdeacon.

The Court then stated the substance of the Articles and Mr. Morley's allegation, and after having most minutely discussed the evidence of the witnesses on both sides, concluded. The Court, therefore, thinks that Mr. Morley was guilty of brawling, and disrespectful, and disobedient conduct towards the Archdeacon. Had this been a proceeding under the statute of Edward the Sixth, the Court would have had no alternative, but must have suspended Mr. Morley from the discharge of his duties; but under the general law a milder course is open to the Court, and it may admonish him to be more careful in future, and I do admonish Mr. Morley accordingly. But another question arises here, which is one of considerable difficulty, the question as to costs, which, considering the length of the proceedings, will be heavy on one side or the other; under general circumstances, where Articles are proved, costs follow as a matter of course; but in the present case, the Articles are not borne out anything like to the extent to which they go; it was not until the Archdeacon said he must remove Mr. Morley that he used the words proved to have been uttered by him, and had the charge been confined to what is now proved in evidence, the defendant might have given an affirmative issue to the Articles; but looking to what is proved against Mr. Morley, he could not have been expected to give an affirmative issue to the Articles admitted in this case; on the other hand he has been guilty of an offence. Upon the whole of the case then, with reference to the length of the proceedings, and the

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bulk of evidence, I think it will meet the justice of the case, if I condemn Mr. Morley in the sum of seventy-five pounds, *novine expensarum*.

TREVANION *against* TREVANION.

On Appeal.

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against
TREVANION.

This was an appeal from the decision of the Judge of the Consistory Court of London, rejecting certain articles of an exceptive allegation and directing others to be reformed. (a)

SIR HERBERT JENNER, after stating the nature of the case and the contents of the exceptive allegation, proceeded:—

Held, affirming the decision of the Consistory Court of London, that facts and circumstances having no bearing on the issue in the cause, cannot be pleaded in order to discredit a witness.

The question for the consideration of the Court is, whether the Judge of the Consistory Court of London did right in rejecting the *Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh* Articles of this allegation, and directing the *Third* and *Fifth* to be reformed. I may here observe, that I entertain no doubt as to the propriety of the direction given by the learned Judge of the Court below, rejecting the *Eleventh* Article, and for the reformation of the *Third* and *Fifth* Articles, and the admission of the *First* and *Second*, and I have,

(a) See *ante*, p. 406.

therefore, no hesitation in affirming that part of the sentence.

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The question as to which the argument has been mainly pressed; and which, indeed, is the only part with respect to which any real difficulty arises, relates to the *Fourth, Sixth, Seventh, Eighth, Ninth, and Tenth* Articles; the objections to which may be all classed under one general head, namely, that they are all of them entirely irrelevant and foreign to the issue in the cause, introducing a number of collateral facts, which, if proved, would have no bearing upon the principal question, however they might affect the credit of the particular witness against whose testimony they are pleaded.

It may not, however, be improper here also to observe, that I consider the contradictions pleaded in these Articles to be precise and positive, and going directly to show that the witness has sworn falsely, and not only so, but that he has also so sworn, knowingly and wilfully, for the falsehood must have been within his own knowledge; there can, therefore, be no doubt that if these Articles should be admitted and proved, the evidence of this witness could have no effect whatever in the ultimate determination of this cause.

Under these circumstances it is, that the Court is called upon to give its opinion upon the admissibility of this allegation, and in so doing, it will not think it necessary to go at any great length into the question, because the learned Judge of the Court from which the appeal is brought has taken the trouble of going through all the cases, both in the Courts of Common Law and Equity, and has

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stated the result of his investigations in the judgment in this cause, with a copy of which I have been furnished ; and, because, in examining those cases for myself, I see no reason for arriving at a different conclusion so far as the general result, from that which he has expressed.

With respect to the Courts of Common Law, it is admitted that the rule of practice has now been settled for nearly thirty years, that you cannot ask a witness a question totally irrelevant to the matter in issue for the purpose of contradicting the witness if he should depose contrary to the truth.

With respect to the Courts of Equity, there seems to be more doubt. The case of *Purcell and Macnamara* (a) seems to affirm the principle, that after publication it is competent to a party under the special direction and permission of the Court, for that is necessary, to examine on Articles to the credit of a witness, whether general or particular, with reference to facts to which he had deposed, those facts *not being material to the merits of the cause*, and in several cases of a late date, Lord Eldon (b) seems to have upheld the same doctrine, and to have expressed himself in strong terms upon the propriety of the practice, and I do not find that any of the late cases, as reported, militate against this doctrine ; whether, as the Judge of the Court below intimated, in delivering his judgment, from information which he had received from persons certainly sufficiently competent to give an opinion, such practice has been departed from in later days, I am not prepared to say ; but supposing

(a) 8 Ves. p. 324. (b) See *Carlos and Brooke*, 10 Ves. 49.

the practice to continue as it was at the time when the case of *Purcell and Macnamara* occurred, I do not think that it necessarily forms a precedent for these Courts whose practice in many respects differs from that which is stated to prevail in the Courts of Equity; for, in the first place, these Courts do not, and will not, permit an examination into the general character and credit of a witness after publication, all such objections must be taken before the evidence of the witness is seen; whereas in this respect a different practice seems to be followed in Chancery.

In another respect also we differ from them, namely, in permitting a witness to be contradicted after publication, as to facts to which he has deposed, those facts being *pertinent* to the issue to be tried; and the only exception to this rule is, that the facts so deposed to, shall not have been pleaded in such a manner as to have enabled the party to contradict them before publication; and I may state it as the general rule here prevailing, that the facts contradicted in an exceptive allegation must have some, though not, perhaps, a very strong bearing upon the principal question; and that if facts wholly irrelevant to the issue are allowed to be pleaded after publication in contradiction to a witness, that is an exception to the general rule in these Courts, whereas, in the Court of Chancery it appears to be an indispensable condition, the very foundation of the rule, and that without which the permission would not be given to examine to; I do not, therefore, think that our practice can be made to depend upon that of the Court of

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Chancery, but that we must look to ourselves, and to our own records. There are certainly very few reported cases on questions of this nature, and they are very far indeed from furnishing any thing like a rule of practice. It is only of late years that reports of decisions in these Courts have been published, which may, perhaps, account for this deficiency; but still, many of us have been here long enough to have been engaged in cases in which the question has been mooted, and I fear I may say with different results; the admission or rejection of such allegations seeming rather to have been made to depend upon the presumed importance of the testimony given by the witness upon points connected with the issue to be tried, rather than upon the irrelevancy of the contested facts. The two cases which were alluded to in argument of *Evans against Knight and Moore*, (a) and of *Westwood against Burke* (b) may, perhaps, be taken as examples. In the former of those cases nothing could be more irrelevant to the issue to be tried, than the facts to which the witness had deposed, which were sought to be contradicted, and yet the learned Judge of the Prerogative Court did not reject the allegation, but suspended the admission of it until the hearing of the cause, for the purpose of seeing whether the case would depend in any material degree upon the credit to be given to that witness; the fair inference, therefore, would be, that if it had been found so to depend, the allegation would have been admitted; and in

(a) 1 Add. p. 138.

(b) 1831, not Reported.

Westwood *and* Burke the allegation was actually admitted, although the facts deposed to were not connected with the issue.

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In the face, then, of these two cases, had nothing further occurred, the Court might have found some difficulty in coming to the conclusion that such allegations were under no circumstances to be admitted. But I think that the case of Whish *and* Woollatt *against* Hesse (a) has set this question, as far at least as this Court is concerned, at rest, and has been since that time considered as having established the rule, that it is not competent to parties to put irrelevant questions to witnesses for the purpose of excepting to their testimony after publication. It is true that that was a criminal proceeding, but I am not aware that that furnishes any important distinction, and I apprehend that in Courts of Common Law, the same principle applies in civil and criminal proceedings, and I do not understand the learned Judge in that case to have stated this rule as supported by a series of adjudged cases in these Courts, but as one proper to be followed in future, as being founded upon just principles.

Since that case was decided, I am not aware that any has occurred in which an exceptive allegation, founded on irrelevant matter, has been admitted, I do not recollect that any such was cited in argument; on the other hand, some few others have occurred in which such allegations have been rejected in this Court, but upon which I do not rely, further than as showing that the practice has

(a) 3 Hagg. 680.

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since been in conformity with the case of *Whish and Woollatt against Hesse*, and the Court would be inconsistent with itself, if it were now to hold that such allegations were generally admissible.

The only doubt which suggested itself to the mind of the Court was, whether there might not be some exceptions to the general rule, whether it might not be entrusted with some degree of discretion to be exercised according to the particular circumstances of each case, and I am free to confess that I should not have been sorry to have been able to satisfy myself that such was the case, with reference to the peculiar nature of the present proceedings; but having weighed carefully in my mind the conveniences and inconveniences to which such a laxity of proceeding would give rise, I am inclined to think that it is better, upon the whole, to adhere to one settled rule, whatever prejudice it may produce in a particular case, and I think the more wholesome rule is, that which is adopted in the Courts of Common Law, "that you cannot contradict a witness on facts impertinent to the issue;" the consideration which weighs greatly with me, is the difficulty of drawing the line within which such exceptions should be allowed; if, for instance, in the present case the witness had been asked whether he had not made such an affidavit as that produced, in some Court in the West or East Indies, and he had made the same answer as he has given upon his present examination, it would have been equally important to Mrs. Trevanion to have contradicted him as now, and yet it could hardly have been contended that the Court was to issue a requisition for the examination of wit-

nesses to prove the facts, and to hold its hand until that was done, yet the cases, in principle at least, are the same. I again, therefore, state that if the rule is once relaxed, it is impossible to say to what extent it may not be carried, and what expense and delay might not be created by it; to say nothing of the encouragement which, as suggested in argument, it would afford to the practice of administering long and numerous interrogatories upon wholly irrelevant points, a practice which is not even now so sparingly exercised as to require to be further extended by the fostering hand of the Court; and, upon the whole, I am of opinion that the Judge of the Consistory Court of London was right in his decision upon this case, and I, therefore, pronounce against the appeal, and remit the cause.

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A further appeal was prosecuted in this case to the judicial committee of the Privy Council, where the cause is still pending.

PREROGATIVE COURT OF CANTERBURY.

Fox *against* MARSTON and HORDERN.

Marston v Fox S.C. 8. A. & C. 12. 12.
C. 2. Rev. & P. 12. 12.
 On the Admission of an Allegation.

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Fox
against
 MARSTON
and
 HORDERN.

The question at issue in this case was, whether or not the will of John Fox, deceased, was revoked by his subsequent marriage, and the birth of a posthumous child. The will bore date the 17th January, 1835. The marriage of the deceased took place on the 21st February, 1835. He died on the 13th of May, and the child was born on the 16th of October, 1835.

The will was propounded by the executors in a *condidit*. It was opposed by Ann Fox, the widow of the deceased. The due execution of the will was admitted by her, but an allegation in opposition to the validity of the will was given in on her behalf, pleading, in substance:—

First.—That John Fox, the party deceased, died on the 12th of May, 1835, aged about fifty-nine years, that he was possessed of or entitled to personal estate and effects of the value of about £10,500, and of real estate of the value of about £50,000, and that he was indebted to various persons to the amount of about £11,000.

Second.—That at the time of the execution of

the will in question, (January, 1835) the deceased was a bachelor, that on the 21st of February in the same year he and Ann Fox, then Bakewell, were married.

Third.—Pleaded a copy of the entry of the marriage in the Parish Register.

Fourth.—The death of the deceased on the 13th of May, 1835.

Fifth.—That the said deceased left his wife, the said Ann Fox, the party in this cause, *enceinte* with child, and that in due time afterwards, to wit, on the 16th of October, 1835, she gave birth to a male child, the issue of her marriage with the said deceased.

This allegation was opposed. It was submitted that the facts pleaded were not sufficient to raise the presumption that the will was revoked; that in no case had it been held that a will was revoked by marriage and the birth of a child, except where the widow and child were wholly unprovided for (*a*). There might be in this case an after purchased estate, or marriage settlement, and upon the face of the will itself it appears that the deceased left certain property to the wife during life, or so long as she should remain sole and unmarried (*b*), and

(*a*) Williams's Law of Executors, vol. 1, p. 108, (2nd edition).

(*b*) The deceased by his will gave and devised the rents and profits of certain freehold estates, amounting to the annual sum of about one hundred and sixty-seven pounds, to Ann Bakewell, spinster, and her assigns for and during the term of her natural life, or so long thereof as she should remain sole and unmarried, subject nevertheless, to impeachment of waste, and from and after the decease or marriage of the said Ann Bakewell, which shall first happen, he devised the said estates to his relation, William Marston and his heirs and assigns for ever; and after a few legacies, the residue, both real and personal was given to William Marston, and he and John Hordern were appointed executors.

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it might well be doubted whether the deceased himself having afterwards married her, could be held to be an ademption of that legacy.

But the Court admitted the allegation, without giving any opinion, until the whole of the facts and circumstances of the case should be before it.

In reply to this, a further allegation was given in on behalf of the executors, pleading, circumstances showing the deceased's adherence to his will notwithstanding his marriage, and various declarations of the deceased for the purpose of repelling the presumptive revocation of the will in question.

As the argument against the admission of this allegation was directed almost entirely to the point, whether parol declarations of a testator are admissible, for the purpose of rebutting the implied revocation of a will arising from marriage and the birth of a child, it has not been thought necessary to set forth the contents of the allegation.

Lushington and *Addams* opposed the admission of the allegation.

The King's Advocate and *Nicholl*, *contrà*.

SIR HERBERT JENNER.

An allegation, pleading parol declarations of a testator, to rebut the implied revocation of a will from marriage, and the birth of a child, admitted.

This case comes before the Court upon an objection made to the admission of an allegation, pleading facts and circumstances and declarations of the deceased, in reply to an allegation which had been admitted, setting up the revocation of the will of John Fox, the deceased, by reason of his subsequent marriage and the birth of a child.

The will in question bears date the 17th of January, 1835. The deceased was married on the 21st of February, died on the 12th of May, and the child was born on the 16th of October in the same year.

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The principal question which the Court has to determine is, whether the parties who oppose the presumptive revocation of this will are at liberty to plead the parol declarations of the deceased, in order to support the validity of that will against the presumption of law.

In the course of the argument, several cases were referred to which have been determined in the Courts of Common Law and Equity, to show that with respect to real property, the declarations of the deceased could not be pleaded, and it was contended that such evidence, on principle, ought not to be received here; at the same time, it was not denied, that in the Ecclesiastical Courts parol declarations have been constantly admitted.

Now, the questions with regard to real and personal property differ very materially, and the considerations applicable to each description of property, are in themselves very distinct. In the first place, a will of personal property requires no publication; it does not require to be attested by witnesses; it does not even require the signature of the deceased: all that is necessary for its validity is, that it should be reduced into writing during the lifetime of the testator; no other formality whatever is necessary to give it effect and operation: whereas, with respect to a will of real property, the Statute of Frauds requires that it should be executed in the presence of three witnesses, and

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attested by them, and that Statute goes on to provide that such will shall not be revoked, except in certain particular modes, which are pointed out by the statute, and that it shall stand good—for there are affirmative and negative words in the statute—until it shall be revoked by one of the modes pointed out. There is also another distinction between the two species of property, which is very important to be borne in mind, namely, that the disposition of the property is different in itself. In the case of intestacy, the personal property will be divided among all those who are in the same degree of relationship. If there is a widow and children, the widow will take one-third, and the rest will be divided among the children equally, whether of an original or of a second marriage; whereas, with respect to real estate, the whole would devolve upon the son, or if there should be one of the first marriage, without any benefit being derived by the sons of the second marriage, or either of the daughters; it is impossible, therefore, that the two species of property could stand in a more distinct and different situation with respect to distribution in case of intestacy.

As the question as to the admissibility of parol evidence with regard to the real estate remains to be argued before the Judges, Mr. Baron Alderson having rejected the evidence on the trial before him, and a bill of exceptions having been tendered to his decision, this Court, it is said, is called upon to state upon what principle it is that this presumed revocation rests, whether on a total alteration of circumstances, from which it may be presumed that the deceased would not wish his will to remain; or, upon

a tacit condition annexed to the will itself at the time of making it, that if there should be such an alteration that the will should not stand. But I do not know that I am called upon to determine that question at the present time, any more than my predecessors in this chair have been at an earlier period, for the question is left in precisely the same state.

The point remains doubtful as to real property, (that is the utmost extent to which it can be put); although with respect even to real property, I am not aware of, nor have I been referred to any case in which parol evidence has been rejected, where it was offered for the purpose of *repelling* the presumption of law; and in these Courts the decisions are all in one uniform current, admitting such evidence in all cases of presumed intention.

Now the principal cases referred to by the learned counsel on one side and the other were, first, that of *Brady and Cubitt*. (a) In that case, Lord Mansfield considered that the marriage and birth of a child afforded a *mere presumption*, that the deceased did *not intend that his will, under those circumstances*, should stand; and he said, "I am clear that this presumption, like all others, may be rebutted by every sort of evidence;" and parol evidence was admitted in that case; in this opinion the other Judges, Willes, Ashurst, and Buller concurred; here, therefore, is a clear and explicit decision of the Court of King's Bench, consisting of the learned persons I have mentioned, that parol evidence was admissible, for the purpose of repelling that which is described as a mere presumption, and I am not

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aware of any case in which such decision has been reversed.

The next case referred to was that of *Lancashire and Lancashire*, decided in 1792, (a) (*Brady and Cubitt* being in 1775), the great point in that case was whether a posthumous child stood in the same situation as one already born. The decision in this case does not interfere with that of *Brady and Cubitt*, the parol evidence being offered to support the revocation of the will, and not to repel the presumption. Lord Kenyon said, "I disclaim paying any attention to the declarations of the husband, because letting in that kind of evidence would be in direct opposition to the Statute of Frauds;" that is to revoke a will of lands; and Mr. Justice Buller said, "Marriage, and the birth of a child produce a revocation of a will of lands, such revocation is by presumption of law, and implied revocations are not affected by the Statute of Frauds." He said, "I entirely concur with my Lord that no attention is to be paid to the declaration stated in the verdict. If there is any revocation at all, it is so by presumption of law, independently of express declarations."

In *Brady and Cubitt*, he was of opinion that declarations were admissible to rebut the presumption, so that this is only a decision that they are not admissible *to revoke*, and may well consist with the case of *Brady and Cubitt*.

In *Goodtitle and Otway*, (b) the Court of Common Pleas refused to admit parol evidence, to shew that the testator meant the will to remain in force, unrevoked by a subsequent conveyance by lease and

(a) 5 Durnford & East, p. 49.

(b) 2 H. Blacks. p. 516.

release to trustees, to other uses than those in the will. Chief Justice Eyre said, "Revocations by operation of law, are on the ground of *presumptio juris et de jure*, that the party did intend to revoke, and that *presumptio juris* is so violent that it does not admit of any evidence to repel it, and this makes it difficult," he said, "to understand the case in Douglas, (*Brady and Cubitt*) supposing that to be a case of revocation by operation of law, and not within the Statute of Frauds."

Buller, Justice, who was also one of the Judges in *Brady and Cubitt* and in *Lancashire and Lancashire*, distinguished the case of *Brady and Cubitt* from that, saying, "There was a great difference between cases which depend on circumstances, and those which depend on the solemn acts done by the party himself, and that distinction supports the case of *Brady and Cubitt*. There was no act in that case done by the testator, importing that he meant to revoke his will or to change it in any respect, but changes having happened in his family by marriage and the birth of a child, there was a *presumption of revocation*, and therefore it was to answer that presumption that the Court received parol evidence. But," he adds "I cannot find from any one case quoted at the Bar, that the Court has received parol evidence in the case of a deed executed by the party himself, with a view of altering the construction of the instrument. I think the cases on the other side prove that it cannot be done." He then refers to *Parsons and Freeman*, (a) cited in argument, as directly in point, and as the strongest that could be put, because it appeared that

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the intention of the testator was to confirm and not revoke his will. He concludes, "I, therefore, think that this is a *presumptio juris et de jure*, and that the case must stand or fall by the rule of law, without being explained by parol evidence." Heath, Justice, agreeing, said, "A will may be construed according to the intention of the party, not always observing the strict rules of law; but a *deed* must take effect according to its legal operation, and it is impossible to admit evidence to explain it." And Rooke, Justice, says, "This being a question of mere law,"—whether the deeds did revoke the will or not.—"I think we ought not to admit any evidence, because it cannot possibly affect the question."

This then was the case of an absolute revocation by operation of law, by the execution of the deeds depending upon technical rules affecting real property; and Mr. Justice Buller, although agreeing in this judgment, adheres to and reconciles his opinion in *Brady and Cubitt* with it, also thereby shewing that the decision in *Lancashire and Lancashire* did not clash with that in *Brady and Cubitt*, as it is clear it did not. It also shows that the revocation of a will by marriage and the birth of a child, is merely a *presumption*, and not an absolute revocation, otherwise, as in *Goodtitle and Otway*, no evidence could be received against it, and it is admitted that facts and circumstances may be received against this presumption, although it is contended that parol evidence cannot.

In *Gibbins and Caunt*, (a) Lord Alvanley certainly expresses an opinion that parol evidence

(a) 4 Ves. p. 840.

ought not to be received, and that the circumstances ought to be held an ademption, without reference to any particular knowledge the testator might have; but he seems to admit the practice to be otherwise, his words are, "We all know now that a will is revoked by a subsequent marriage and the birth of a child; I believe they do go the length of permitting evidence to be received against that, I do not like that; and Lord Kenyon, in the last case, *Lancashire and Lancashire*, did not form his opinion upon it. The circumstances themselves should be held to be an ademption, independent of any particular knowledge the testator might have. I think that the very circumstance of a wife and child infer a presumption that the will shall not stand." This was Lord Alvanley's opinion, but the case did not require him to decide the point, and he did not do so.

In *Kenebel and Scrafton*, (a) Lord Loughborough said the parol declarations weighed nothing, because they did not amount to a republication; this is a strong expression of his Lordship's opinion, that the revocation was absolute which is not contended for; and in the same case, in the Court of King's Bench, on an issue directed from the Court of Chancery, (b) Lord Ellenborough decides the case in favour of the will, neither rejecting nor admitting the parol evidence; so that his Lordship did not think the rule was clear either for or against receiving such evidence, though on the trial in which the special verdict was found, parol evidence had been received and was set forth in the verdict. He also declined to decide whether the doctrine of implied revocation rested on

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(a) 5 Ves. 663.

(b) 2 East, 530.

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change of intention or on tacit condition, although he said the latter was the better foundation of reason.

In *Sheath v. York*, (a) the will was revoked in the Ecclesiastical Court as to the personalty, and not revoked as to the realty, on the ground that the children of the second marriage would derive no benefit from the revocation, the effect of it being to give the whole of the real estate to the son of the former marriage, which by the will was directed to be sold, and the proceeds divided between the son and two daughters of that marriage.

Sir William Grant, speaking of the revocation of the personal estate, says, "The revocation as to personal estate had an effect which might, perhaps, have been intended by the testator, that of letting in the after-born children with those of the first marriage; but the principle of the decision has no bearing whatsoever on the devise of the real estate, which according to my opinion stands unrevoked."

This shews that there is nothing very absurd in drawing a distinction between wills of real and personal property, from the different principles applicable to one and altogether inapplicable to the other description of property, and forms a precedent for a different determination with respect to each kind, though disposed of by the same will.

With respect then even to a will of lands, there is one case, that of *Brady and Cubitt*, which decides that parol evidence is admissible to rebut the presumption of the revocation of the will of a man who, after the date of the will, should have married and had children. But none have been cited in which such evidence has been rejected; although

(a) 1 Ves & B. 390.

there are some opinions of learned Judges strongly expressed, that it ought not to be admitted, and that the revocation should be absolute, requiring a republication, with all requisite formalities to revive its effect.

But whatever doubts may exist as to the propriety of adopting this rule as to wills of land, it does not follow that the same rule should apply to wills of personalty. I have already said, that they depend upon different principles, require no formality in the execution, no publication, no attesting by witnesses; all that is required is that they shall be in writing, and the statute only enacts as to the revocation of them, that they shall not be revoked by words, or by will by word of mouth, only. It is admitted that parol evidence has been always received in these Courts, and there are numerous cases which might be cited to that effect, if the admission of the fact did not supersede the necessity of so doing. The Court, therefore, has nothing to do but to follow the course which has been pursued by its predecessors in this chair, and to hold, until otherwise instructed by a superior Court, that parol evidence may be received. I cannot see any difference between admitting parol evidence in such a case as the present, and in that class of cases relating to the revival of a will, by the cancellation of one of a later date, in which declarations have always been received to shew the intention of the testator.

A further objection was taken to the declarations of the deceased of his doubts of the chastity of his wife and of his disbelief that the child was his; and the observations of Lord Mansfield in *Goodright against*

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Moss, (a) were cited, that the declarations of a father or mother cannot be admitted to bastardize the issue born after marriage. And that, "it is a rule founded in decency, morality, and policy, that the father and mother shall not be permitted to say, after marriage, that they have had no connection, and that, therefore, the offspring is spurious." But these declarations are not pleaded for the purpose of bastardizing the issue; if so, I should be of opinion that they are not admissible, but the object is to shew the motive upon which the deceased acted, and in that view, I think, they may be pleaded.

The Court then, after some slight alterations, admitted the allegation.

The decision in this case was appealed from to the Privy Council, but the will being held to be revoked at law, the case in this Court was compromised, and the widow took out administration to the deceased as dead intestate.

(a) 2 Cowp. 591.

ARCHES COURT OF CANTERBURY.

BAKER and DOWNING against WOOD.

This was a cause of subtraction of Church rate brought by letters of request from the Consistory Court of Worcester, and was promoted by William Rose Baker and Francis Downing, the Churchwardens of the parish of Dudley, in the county and diocese of Worcester, against Thomas Wood, a parishioner and inhabitant of the said parish.

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After the usual proceedings, the libel was admitted, pleading :—

First.—That on the 25th of September, 1834, the Churchwardens, &c. met in vestry, in the vestry room, pursuant to notice, in order, amongst other things, to grant a rate of tenpence in the pound for the repairs of the parish Church, and of the Chapels of St. Edmund and St. Andrew belonging thereto, and the expenses of the Churchwardens incidental to their office. That the said rate was proposed and seconded, and a shew of hands taken, but a poll being demanded and acceded to, the meeting was adjourned to the Town Hall, and the poll was immediately proceeded in, and continued till four o'clock in the afternoon of the said twenty-fifth of September, and was resumed at ten o'clock in the forenoon of the following day, and continued until four o'clock in the afternoon, and was again resumed at ten o'clock on the following day (the twenty-seventh,) in the forenoon, and continued till twelve o'clock of that day, and then closed. That the votes were then ascertained, and it was found and declared by the Chairman, that a great majority were in favour of the rate, and thereby it was determined that a rate should be made, and

Notice having been given of a meeting in vestry for the purpose of granting a Church rate, and that if a poll should be demanded, that the meeting would be immediately adjourned to the Town Hall. The meeting being held and a poll demanded, the Chairman immediately adjourned the meeting to the Town Hall, where the poll was taken : Held, that the proceeding was regular, no business having

been interrupted by it, and the adjournment being part of the original appointment.

The Town Hall held not to be an improper place to take the poll, by reason of its being private property, no person having been prevented from voting on that account.

The time for taking the poll being limited to eleven hours : such time held to be sufficient if due diligence had been used. Seven hundred and eighty-five persons being the greatest number proved to have voted on any occasion.

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that every parishioner or person rateable, be taxed at the rate of ten-pence in the pound, in order to raise the sum of £931, the estimated amount of such repairs and expenses, &c.

Second.—That Thomas Wood, at the time of making such rate, resided and occupied a certain messuage or dwelling house in the parish of Dudley, of the yearly rent or value of fifty pounds, at the least, but which was rated at twenty-one pounds only, and that he was accordingly legally assessed at the sum of seventeen shillings and sixpence.

Third.—Exhibited the original rate, and pleaded that in compliance with the said rate, several of the inhabitants of Dudley have paid the rates so made upon them, amounting to the sum of £540, and upwards.

Fourth.—That Baker and Downing were at the time of making the said rate, and now are, the Churchwardens of the parish of Dudley, and that the said sum of seventeen shillings and sixpence assessed upon the said Thomas Wood is now due to them.

Fifth.—That Wood had been several times requested to pay the said sum, but still refused to pay the same.

Sixth.—That in consequence of such refusal, Baker and Downing caused Wood to be summoned to appear on the third of August, before two justices of the peace for the County of Worcester. That he appeared, and refused to pay such rate, and informed them that he objected to the validity of the same, and to his liability to pay it, and that in consequence they had no authority to enforce payment. The *Seventh, Eighth and Ninth* were the usual Articles.

In answer to this, an allegation was brought in on behalf of Mr. Wood, pleading:—

First.—That on the 7th August, 1834, a meeting was held in the vestry room, at which a church rate was required by the Churchwardens, when it was moved and carried by a large majority, "That this meeting do adjourn to this day six months," and such resolution was then entered in the minute book of the proceedings in vestry, and signed by seventeen of the inhabitants then present. That at the meeting held in the vestry room of Dudley, on the twenty-fifth of September, 1834, in the libel referred to, the Rev. Luke Booker, the Vicar of the parish, being in the chair, a motion was made and seconded to the following effect:—"That the irregular entry made in the "vestry order-book on the seventh day of August last, that the meeting "held on the said seventh day of August should be adjourned to that "day six months, be expunged, and that a rate of ten-pence in the "pound be granted to the Churchwardens." That the entry so termed irregular, was the entry in this article previously mentioned; that the motion so comprehending the said two subjects was thereupon put by the Chairman, and a shew of hands having taken place, the

Chairman declared that the same was apparently so equal, that he could not decide on which side was a majority; that a poll having been demanded and acceded to by the Chairman, *he assumed the authority of adjourning*, and did adjourn the meeting to the Town Hall, without the consent of the meeting, and without any motion having been put to them, and quitted the chair for the purpose of presiding at such adjourned meeting; notwithstanding many of the rate payers openly dissented from, and protested against, such adjournment, before the same took place, and before the Chairman had quitted the chair. That no motion whatever (save as aforesaid), was submitted to the said meeting, before the Chairman so quitted the chair, and the said adjournment took place, which did not embrace the said question of expunging the entry of the 7th of August. That the Town Hall is not the property of the parish, nor is the same public property, but is the property of a private individual, on which account objections were then and at previous times taken to the adjourning thither, lest the parishioners might be obstructed in the exercise of their rights.

Second.—Pleaded copies of the entries made in the vestry order-book of the proceedings on the 7th August and twenty-fifth September, 1834,—the original entries to be produced, if necessary, at the hearing of the cause.

Third.—That after the Rev. Mr. Booker had quitted the chair, a motion was submitted to the meeting in the vestry room, and carried by a great majority of rate payers, that Thomas Lester (who was then a parishioner and inhabitant of the parish), should be the Chairman of the meeting; that he having accordingly taken the chair, a resolution was proposed and carried by a large majority of the rate payers then present, that the question of granting a church rate for the year then ensuing, should be adjourned for nine months; that such resolution having been reduced into writing, was signed by the Chairman and a large number of the rate payers, but that no entry was made in the vestry order-book,—and the paper on which the said resolution was written was annexed.

Fourth.—That after the pretended adjournment to the Town Hall, the polling commenced at about one o'clock, on the twenty-fifth September, Mr. Booker being in the chair, notwithstanding one of the rate payers, before the commencement thereof, formally protested at the said Town Hall, as well against the said adjournment, as against the subsequent polling, that the polling continued until four o'clock of the said day, being resumed at ten o'clock on the following day, and was continued until four o'clock of that day, and being again resumed on the following day, the twenty-seventh, was continued until twelve o'clock of the said day, when the Chairman arbitrarily declared the same to be closed, without any consent or authority whatsoever and without any motion to that effect having been submitted to the said meeting, and notwithstanding many of the rate payers then and there

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present, who were entitled and willing to vote and were waiting at the Town Hall for that purpose, and were thereby prevented from voting, and notwithstanding many of such persons applied to the Chairman to continue the poll open, in order that they might vote, and that the poll was in fact (however illegally), closed accordingly. That the time, to wit, eleven hours, allowed and occupied during the said three days, for taking the votes before the poll finally closed, was less than usual, and insufficient for the rate payers who were qualified, and who wished to vote on the occasion of the said adjourned meeting, the rate payers so qualified being at that time sixteen hundred and upwards in number, and it not being practicable for ninety persons at the most to record their votes per hour. That the motion as originally submitted in the vestry room, prior to the said pretended adjournment, including both the rate proposed, and the question as to expunging the entry of the seventh of August preceding, was not put to many of the rate payers, who voted at the Town Hall on the said days, but that many of such rate payers were merely asked whether they voted for or against the rate, and gave their votes accordingly, without any reference to the question of expunging the said entry, and in utter ignorance that the same formed part of the original motion. That although it was found and declared by the Chairman that a great majority of votes were in favour of the rate, yet that such majority included the votes of many persons who had not been present in the vestry room, prior to the adjournment, when the motion with respect to such adjournment was originally put to to the meeting. That at such time, namely, before the adjournment, the whole number of persons present in vestry did not exceed ninety. That the votes on the said 25th, 26th, 27th days of September were taken according to the provisions of the Vestry Act, according to value, and not numerically, the numbers being, to wit, in value 474 for the motion, and 390 against it, but that, in fact, a great majority of the rate payers, who voted on the said three days, were against the said rate, 385 having voted against, and 363 for the said rate.

Fifth.—That two several protests in writing, each signed by a rate payer, present at the said pretended adjourned meeting, and who were at such time respectively entitled to vote, were publicly read at the said meeting, (copies thereof having been first taken), and were presented to the Chairman on the twenty-seventh September, previously to his declaring the poll to be closed, the one thereof protesting against the arbitrary close of the poll before sufficient time had been allowed, and as being contrary to the sense of the meeting, particularly of numbers who had not time to record their votes; the other protesting against the expunging the proceedings recorded in the vestry order-book on the 7th August preceding, by reason that the question as to expunging the same had not been put to the voters. That no entry

of such protests or either of them was made in the vestry order-book, and that the original protests have been since lost or mislaid.

Sixth.—Exhibited copies of the said protests.

Seventh.—The usual concluding Article.

In reply to this, a further allegation was admitted on behalf of the Churchwardens, pleading:—

First.—That the Rev. Luke Booker, the Chairman, did not, after the polling had continued until twelve o'clock of the said twenty-seventh September, arbitrarily declare the same to be closed, &c. *for that the time and place of the said polling and the duration thereof were fixed and published in the notice by which the meeting was convened.* That such notice stated, that if a poll should be demanded, the meeting would be immediately adjourned to the Town Hall, and that the polling would forthwith commence, and be kept open till four o'clock in the afternoon of the said twenty-fifth day of September, and be continued at the Town Hall aforesaid, from the hour of ten in the forenoon of the twenty-sixth day of September, to the hour of four in the afternoon of the said day; and again at the same place, from the hour of ten in the forenoon, till the hour of twelve at noon, of Saturday, the twenty-seventh, when the poll would be finally closed. That the Rev. Luke Booker, as such Chairman, informed the said meeting that he had not any power or authority to continue or permit the continuance of the polling after the time mentioned in the said notice for closing the same.

Second.—Exhibited a copy of the notice, and pleaded that the original, if necessary, may be produced at the hearing of the cause.

Third.—That the Town Hall is the property of the Trustees of the late Earl of Dudley, and during the last forty years, has been, and still is commonly used for town meetings and public business, and that therein the Magistrates hold their Petty Sessions, and the Revising Barristers their Court. That it was the most eligible place for such adjournment, that no objection was then, or had on any previous occasion been made by any person to an adjournment, on the ground set forth in the said allegation (Wood's), namely, lest the parishioners might be obstructed in the exercise of their rights; nor was any protest made against the use of the said Town Hall on that occasion. That the number of rate-payers qualified to vote, did not amount to 1600, for that the number of rate-payers who at the time, and during the progress of the polling were qualified, and were entitled to vote, did not exceed 1222, or thereabouts, and that the time allowed was ample and sufficient to have enabled all the rate-payers who were qualified and entitled to vote to have so done. That of the rate-payers present at the Town Hall during the first day of the polling, those who were favourable to the rate voted for the same, but that many rate-payers who were adverse to the same were also present, and that they were applied to in order to give their

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votes, and that they declined so to do, insomuch that on the said 25th of September, no vote, hostile to the rate, was polled, or even tendered. That during each of the times mentioned in the said notice, there were considerable intervals during which no persons gave or attempted to give their votes.

Fourth.—The usual concluding Article.

Several witnesses were examined on these pleas, and the cause came on for hearing on the By-day after Hilary Term the 11th February, 1837.

Lushington and *Addams* argued against the validity of the rate, and cited the cases referred to in the judgment of the Court.

Phillimore and *Haggard* in support of the rate; and on the fourth Session of Easter Term judgment was given.

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SIR HERBERT JENNER.

This is a cause of subtraction of church rate, promoted by Messrs. Baker and Downing, Churchwardens of the parish of Dudley, in the diocese of Worcester, against Mr. Thomas Wood, a parishioner, and it is brought by letters of request from the Chancellor of that diocese. A considerable body of evidence has been taken on the several pleas which have been brought in, but the questions for the Court to determine have been reduced to a narrow compass, and the decision must turn on one or two points of law, which have been fully and ably stated by the counsel in opposition to the validity of this rate.

On the facts of the case there is very little difference between the parties, it will, therefore, be unnecessary for the Court to enter into the details of the evidence which has been produced.

The question has been represented by both sides as one of considerable importance, and undoubtedly it is so; and the Court regrets that so long a period should have been suffered to elapse without its being brought to a conclusion. The rate was granted in the month of September, 1834, but it was not until the month of November, 1835, fourteen months afterwards, that the letters of request were presented to this Court, and the decree was not returned till the first session of Hilary Term, on the 11th of January, 1836: so that the proceedings for the recovery of this rate were not set on foot till the whole of the rate ought to have been collected and applied to the purposes for which it was granted. I mention this to prevent any imputation of delay being attributed to this Court: the blame rests on the parties alone; and I should be inclined in future, in cases of church rate, not to accept letters of request where the parties have not used due diligence to bring the question to a speedy adjudication, as through such delay it may happen that many persons may be called upon to pay a rate, which may ultimately turn out to be illegal. In this particular case, when there was no doubt that the validity of the rate was intended to be opposed, the question should have been brought before this Court at as early a period as possible.

Having made these preliminary observations, I proceed to give my opinion of the case as it comes before the Court.

The history of the case is shortly this:—

On the 7th of August, 1834, a vestry meeting was held in pursuance of a notice given for that purpose, to make a grant of a church rate at ten-

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pence in the pound. A considerable number of persons assembled in the vestry room of the parish; so many as to fill the room, which was not of large dimensions, when a motion was proposed, and seconded, that instead of granting the rate, the subject should be postponed for six months. The door of the vestry room was closed, and a great number of parishioners who were in the churchyard adjoining the vestry room, were unable to make their way into the room; and the vicar, who was in the chair, observing that there were many parishioners who had come to attend the vestry meeting, and who, as such, were entitled to give their opinion on the question by a show of hands, but who were unable to work their way into the vestry room, refused to put the question, and quitted the chair. Some of the opponents of the rate remained in the vestry room, and there appeared an entry in the vestry book, that the consideration of the question, as to the making of a rate, was adjourned for six months. On the 21st of September following (the Sunday), a notice was read in the parish church of St. Thomas, that a vestry would be held on the 25th of the month, in the vestry room, for the purpose of making a rate of tenpence in the pound for the Churchwardens, and it may be necessary to read the notice itself, in order to show the purpose for which the meeting was to be held, and to see whether proper information was communicated and made known throughout the parish. The notice is to this effect:—I read it from the copy annexed to the deposition of Mr. Allen, the parish clerk:—"Notice is hereby given, that a meeting of the inhabitants in vestry of and for this parish will be holden in the vestry

of St. Thomas's Church at 11 o'clock in the forenoon of Thursday the 25th September, instant, for the purpose of expunging an irregular and improper entry made in the vestry order-book at a meeting held on the 7th day of August last, and for the purpose of granting the Churchwardens a levy of tenpence in the pound." The entry referred to as "irregular and improper" is that to which I have already adverted, which had been entered in the vestry book after the vicar quitted the chair at the meeting of the 7th of August. The notice goes on to state:—"If a poll be demanded, the meeting will be immediately adjourned to the Town Hall, and the poll will commence forthwith, and be kept open till four o'clock in the afternoon of the said 25th day of September, and the polling will be continued at the Town Hall aforesaid from the hour of ten in the forenoon of Friday the 26th of September, to the hour of four in the afternoon of the same day, and again at the same place from the hour of ten in the forenoon till the hour of twelve at noon on Saturday the 27th day of September, when the poll will finally close." Full notice was, therefore, given of everything intended to be done, as full and explicit a notice as could be; and it is clear, from all the evidence, that the effect of the notice was promulgated immediately after its publication throughout the parish in every place where there was any probability of the information being expected.

It appears that a meeting was accordingly held in the vestry room of the parish on the 25th of September, the vicar, the Rev. Dr. Booker, in the chair; that the assembly of parishioners filled the

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vestry room, and that there were numbers in the churchyard adjoining, and at the commencement of the proceedings, the vicar read the notice by which the vestry had been called, and which contained full information to the parties assembled of the particular subjects for discussion. On a motion of Mr. Badger, a show of hands was called for, when the numbers for and against the question were so nearly equal, that the Chairman declared he was unable to say on which side the majority was, upon which a poll was demanded by Mr. Wainwright, the curate of the parish, which was seconded by some other individual, and was immediately granted.

On the poll being granted, the Chairman quitted the chair, and proceeded to the Town Hall, where the polling immediately commenced and continued according to the notice till four o'clock of the afternoon of that day, when it was adjourned to ten o'clock the following morning; when it recommenced and continued till four in the afternoon, was resumed the following morning at ten, and finally closed at twelve o'clock on that day, having been open for eleven hours, or eleven hours and a half. There is some difference between the parties as to the time when the adjournment took place on the morning of the first day, but it is not very material whether it was half-past twelve or one o'clock. But it closed on the third day in conformity with the notice which had been given.

It appeared, on casting up the numbers on the final close of the poll, that there was a majority of votes in favour of the rate: calculating the votes according to the value of the property held by the

persons who voted, there being 472 in favour of the rate and 395 against it, making a total of 867 votes, shewing a majority of 77 in favour of the rate. The number of voters, however, was 748, of which 385 voted against the rate and 363 for it, showing a majority in numbers of 22 against the rate.

The question is, whether the majority thus obtained is a legal one, or whether all that has been done is to go for nothing. In entering upon the consideration of this question, I have nothing to do with what took place on the former occasion, after the Chairman quitted the chair; that is, whether it was regular or proper that the remaining persons should record a vote that the consideration of the question of a church rate should be postponed for six months; that is not a question which the Court can entertain. The only question for the Court to decide is this, whether the rate made on this occasion was in pursuance of a legal vote of the vestry under the circumstances I have stated.

The validity of the rate is not questioned on the usual grounds of objection to church rates, it is not alleged that the rate required was not necessary; nor that there is any excess in the amount of the rate, although the sum to be collected was considerable, being upwards of nine hundred pounds; it is not stated that there is any inequality of assessment, nor that the purposes for which the rate was made were those to which a church rate cannot properly be applied, and no objection is taken as to a want of due specification of the purpose for which the meeting was called: indeed, it was contended in the argument that the notice was too specific, that the Churchwardens had no right to

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fix tenpence in the pound as the amount of the rate; that all they had to do was to call a meeting, and to leave the parishioners to determine the amount of the rate. But this is an objection which cannot be insisted on, for it was nothing more than an intimation of the Churchwardens of the amount of rate which would be required, leaving it to the vestry to determine whether the amount should be reduced to sevenpence or any smaller sum. So with regard to the objection as to that part of the notice for expunging the entry irregularly and improperly made in the vestry book; if the impression on their minds was that the proceeding was irregular and improper, it might be necessary that notice should be given in the church; and considering the circumstances of the case,—the room being filled, and there being individuals in the churchyard who could not get access to the room to express their sentiments by a show of hands, my opinion is that they justified the Chairman in the course he took on that occasion.

Having stated that the objections to the validity of this rate are not the usual objections in questions of this description, that no objection has been made on the grounds I have stated, the Court may assume that the rate was proper in itself, in its amount, in the manner in which it was proposed, and as to the persons from whom it was to be collected. Under these circumstances, undoubtedly the rate comes before the Court under circumstances peculiarly favourable to it, and it would be the wish of the Court, not less than its duty, to support it, unless the party opposing it can show such grounds of opposition as should render it impossible for the

Court to do so : and it is admitted that the party opposing the rate stands on his strict right of law, and that he is not entitled to any favourable consideration.

What then are the grounds on which the rate is impugned ? The grounds which I collect from the argument which has been addressed to the Court, are these : First, that the Chairman adjourned the poll without any legal authority ; secondly, that the place to which it was adjourned was private property, to which the parishioners and inhabitants of the town of Dudley had no legal right of access, and was, therefore, an improper place ; and, thirdly, that the time fixed for the duration of the poll was insufficient with reference to the number of persons entitled to vote ; and on all or some of these grounds, it is contended that the rate is invalid.

Before the case was ripe for determination before the Court, other objections had been urged, both in plea and in argument, in this Court. It was stated as a ground of objection to the rate, that only those persons were entitled to vote who were present in the vestry room when the show of hands was called for ; that the voting should not be according to the value of the property, but according to numbers ; these and other minor objections, the whole of which were abandoned subsequently (being disposed of during the progress of the cause, by the decision in *Maund against Campbell*, (a) referred to

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(a) Judgment was delivered in the Exchequer Chamber in this case, on the 26th of November, 1836, on a writ of error from the King's Bench by Lord Chief Justice Tindal ; but no Report of the case has been published, that the Editor is aware of.

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in the argument), it is not necessary for the Court
 particular to notice.

The first objection, then, is to the adjournment
 of the poll, which, it is admitted, took place without
 the opinion of the vestry having been taken upon
 it; and the case of *Stoughton v. Reynolds*, (a) re-
 ported in Fortescue and Strange's Reports, and in
 cases temp. Lord Hardwicke, has been relied on,
 as shewing directly that the power of adjourning
 a vestry meeting is not in the Chairman of the
 meeting, but in the whole body of the vestry; and
 it appears from what was said by Lord Hardwicke
 and the other Judges, that the Court of King's
 Bench was of opinion under the circumstances of
 the case, that the Chairman had no such right as he
 had assumed on that occasion. But in order to see
 the full effect of that decision, the circumstances
 of that case must be considered; and it will appear,
 that they are as far removed from the circumstances
 of the present case as can be well conceived.

I will refer to the case as reported by For-
 tescue, because it has been stated that Lord Hard-
 wicke's opinion was more strongly expressed in that
 Report than in Strange, and in the Report of Cases
 in the time of Lord Hardwicke.

The declaration set forth that the plaintiff, being
 an inhabitant of the parish of All Souls, North-
 ampton, was chosen Churchwarden, and offered
 himself to Dr. Reynolds, Chancellor of the diocese,
 to be admitted to the office, and the Chancellor re-
 fused to admit him. Mr. Stoughton thereupon
 moved for a *mandamus* to the Chancellor to admit

(a) Fortescue, 168; 2 Strange, 1045; Case temp. Hard. 274.

him to the office, and the Chancellor returned to the *mandamus*, that he considered the plaintiff was not chosen Churchwarden, but another person. The action was brought for a false return, and a special verdict was found to this effect: That in the parish of All Souls, the vicar has immemorially had the nomination of one of the Churchwardens; that the time appointed for choosing Churchwardens was a day in Easter week, 1734, when the vicar nominated Mr. Lowlk, and the parishioners the plaintiff; that in the Easter week following, in the year 1735; the vicar chose the same person, and upon a dispute arising, whether the parishioners could choose the plaintiff Stoughton a second time, the vicar adjourned the assembly till the next morning, but that part of the parish, who were for the plaintiff staid behind and elected him; and the other party assembling next day, elected another person, and the question was, whether the vicar, who presided, was at liberty, *ex mero motu*, to adjourn the election of Churchwardens without any previous notice or the consent of the meeting, and after the persons present at the meeting had elected a Churchwarden, to proceed without notice to elect another Churchwarden the next morning.

Most undoubtedly, in such circumstances, there is no authority for the power assumed and exercised by the chairman in that case; it was calculated to put an end to the privilege possessed by the parishioners, of electing a person for Churchwarden, and to put a stop to all discussion at a meeting called for the purpose of election.

In deciding the question in that case, Lord Hardwicke delivered an opinion very strongly; that,

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even supposing the vicar had a power of presiding, (that point has been settled since), (a) it did not follow that he had a power of adjourning the meeting, and that the adjournment was void. And the other Judges, Mr. Justice Page and Mr. Justice Lee, delivered the same opinion as Lord Hardwicke. Mr. Justice Lee, said, "The parson has a right of sitting from his freehold in the church; but I do not think that can any ways give him a greater right or authority than any of the other members of the assembly; and it is a rule in law, that the major part in all elections have the right of determining for themselves." So that the decision in that case comes to this, that the chairman or vicar has no right, under the circumstances which have been stated, *ex mero motu*, to adjourn a vestry meeting whilst the business of the vestry meeting is in progress.

The King *v.* The Commissary of the Bishop of Winchester, (b) is an authority for showing (for that is the effect of the case) that where there is no regular presiding officer, the regulation of the meeting devolves on the whole body, and that in the absence of the vicar, the Churchwarden is not entitled to preside. To the extent to which this case goes, it supports the authority of the case of *Stoughton and Reynolds*; that the chairman, as such, has not the power to adjourn the vestry at any time and under any circumstances he may think proper. Another effect of this case the Court will refer to by and bye; but one effect of the case is to show, that where there is no regular presiding officer, the

(a) *Wilson v. M'Math*, 3 Phill. 67; 3 B. & Ald. p. 244, note.

(b) 7 East, 573.

adjournment devolves on the meeting, and not on the chairman.

Considering the nature of these decisions, and the circumstances of the cases, the question is whether they are applicable to the present, and whether there are not many material distinctions between these cases and that which the Court has under its consideration.

Without relying on my own judgment in this particular, it does seem to me that the question has already been decided by the Court of King's Bench, in a case which has been cited in the argument, as the *Manchester case*, (a) which seems to me to run on all fours with the present case.

In the case now before the Court, the notice for calling the vestry in the parish of Dudley, on the 25th of September, was (I believe it has been stated in the argument) copied from the notice in that case, and considering the decision in that case as a precedent for their direction, the Churchwardens and Vicar of Dudley governed themselves according to that case, and followed its provisions as exactly as the nature of the circumstances would permit; and in all the subsequent proceedings, conformed with what had been there decided; and the only distinction I find between that case and the present is, that the former was for the election of a Churchwarden, whereas the present was for the making of a church rate. But this does not make any real difference between the two cases, the principles which it is proper to follow in respect to making a church rate, will be found to be the same as those

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(a) *The King against the Archdeacon of Chester*, 1 Adol. & Ell. p. 342.

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which apply to the election of Churchwardens ; and all the conditions in respect to the conduct of the poll, and the course of the proceedings in an election of a Churchwarden are equally applicable to a poll in the question of a church rate.

What then were the circumstances of that case ? A rule had been obtained, calling on the Archdeacon of Chester, to show cause why a *mandamus* should not issue, calling upon him to swear in certain persons as Churchwardens of Manchester, on the grounds that they were duly elected ; that the meeting at which their election took place was illegally adjourned, and that a poll subsequently taken was not duly taken.

No case can be more clear and direct in its application to the present case than this.

It appeared by the affidavits, that a meeting of the rate-payers was held on Easter Tuesday, the 9th of April, 1833, in the collegiate or parish church of Manchester, for the election of Churchwardens. The Rev. Cecil Daniel Wray, one of the Fellows of the Church, took the chair. The meeting was usually held without any notice ; but on this occasion a contest being expected, the Churchwardens, as it was stated, to avoid unseemly behaviour in the church, had the following notice given in church on the 31st of March preceding the election :—
 “ Notice is hereby given that a meeting of the inhabitants in vestry of and for the parish of Manchester, will be held in the parish church of Manchester, on, &c., at eleven in the forenoon, for the appointment of Churchwardens and Sidesmen for the parish of Manchester, for the year ensuing ; and if a poll should be demanded the meeting will be

immediately adjourned to the Town Hall in Manchester, and the polling will commence and be kept open till four o'clock in the afternoon of the said 9th of April, and the polling will be continued from day to day at the Town Hall aforesaid, from the hour of ten in the forenoon to the hour of four in the afternoon of each day (Sunday excepted) up to and including Tuesday the 16th day of April. (Signed by the Churchwardens.) It goes on to state:—"The chairman, on taking his seat upon the day of election, stated the substance of the notice, after which one of the outgoing Churchwardens proposed a list of persons to serve the office for the ensuing year. The list having been moved and seconded, a considerable clamour and difference of opinion arose; other lists were proposed, and among them, one containing the names of Messrs. Barbour, Rostron, and Grime; and this list being put to the vote, was, on a shew of hands, carried by a large majority. A poll was then demanded; and the chairman, without any motion having been made or vote taken on this subject, adjourned the election to the Town Hall. Several persons (stated on affidavit to have been ley-payers) objected to the adjournment, both at this time and during the poll. Many who had not been at the meeting in the church, polled in the Town Hall; and the Churchwardens' list was carried by a majority 2059 to 28. The archdeacon swore in the parties so selected, and refused to swear in the others. It was further stated, in the affidavits against the rule, that the number of persons entitled to vote at the election was 25,000: and that many persons not qualified to vote were at the meeting in the church, and active in the proceedings." It is

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impossible to read this case, and not see how exactly applicable the whole statement is to the present. There the meeting was to be held in the church; here it was to be held in the vestry room of the parish. There, if a poll was demanded, the meeting was to adjourn to the Town Hall; so here, if a poll was demanded, the adjournment was to be to the Town Hall. The time for the commencement and termination of the poll was fixed, as in this case, and the chairman, without a motion to that effect, adjourned to the Town Hall; and so here in conformity with the notice, when a poll was demanded the chairman proceeded at once to the Town Hall. And notwithstanding what took place in that case, notwithstanding no motion for adjournment was put, and notwithstanding the case of *Stoughton and Reynolds*, which was cited in the argument by the Counsel, the Court of King's Bench held that the proceedings in that case had been regular, and that (as was expressed by Lord Denman) it was necessary "to lay down some order for the proceedings;" he says, "I think it is competent to them to say that the meeting shall be held in one place, and in a certain event which may require it, shall be removed to another." Neither of the learned Judges denied the authority of the case of *Stoughton and Reynolds*, but held that it did not apply to the case before them. They do not recognize a discretionary power in the chairman to adjourn the meeting arbitrarily; but the adjournment of the poll was a part of the original proceeding; and so there was no inconsistency between that decision and the decision in the case of *Stoughton and Reynolds*. So in this case, it was competent for

the chairman to pursue the course expressly pointed out in the notice. *That* could not be legal at Manchester which is illegal at Dudley. In the former case, the adjournment was from the church to the Town Hall; in the present case it was from the vestry-room to the Town Hall of Dudley. There was no surprise in this case, for the notice expressly stated that such would be the course adopted. The notice was given in pursuance of the Vestry Act, four days before the vestry was held, and there is every reason to believe, from what appears in the evidence, that it was known immediately after publication throughout the whole town of Dudley.

I cannot, therefore, on this first point see any distinction between the two cases, and having this, as I consider it, direct authority and precedent on this point, I am of opinion that the adjournment from the vestry-room to the Town Hall, for the purpose of the poll, was a legal adjournment.

The second objection is this, that the Town Hall is private property. And this is true; for it appears that the Town Hall belongs to the trustees of Lord Ward, and the parishioners have, therefore, no right of admission there; and it is stated by Mr. Slocombe, one of the witnesses, that on an occasion some years before, a conversation took place between him and Mr. Downing, one of the parties in this cause, who was one of the agents of Lord Dudley, and is a trustee of the present Lord Ward, as to the right of the parishioners to assemble there; when Mr. Downing asserted that the parishioners had no strict right to the use of the room; but it does not appear that on any occasion there was an instance of a parishioner

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being prevented from attending on this ground. It is admitted that on this occasion there was no obstruction ; and it is not suggested that any person kept away from an apprehension of not being able to get access to the place. Had either of these circumstances occurred, the case might have been different ; but the objection exists in idea only. It is stated by Mr. Shorthouse, clerk of the Board of Guardians, and collector of the rates in Dudley, that the Hall is resorted to for public meetings of different descriptions, and that vestry meetings have been held there previously, when rates have been made ; and it does not appear that any objection has been made to the validity of a rate on this ground. The vestry-room is stated to be a very inconvenient place for a poll, and it must be so as the room seems to be small, though it was indeed stated in the argument that the poll might have been taken there, though it is admitted that the room could not contain more than ninety persons at the utmost, and the difficulty of going and returning would be almost insurmountable. And I cannot but think that it would have been highly improper to have adjourned the poll to the church, considering the great excitement which prevailed in the town of Dudley at the time on the subject of church rates.

But it is not improper for me to state shortly, some parts of the evidence as to the convenience of this place for taking the poll ; and the first witness is Mr. Twamley, on the sixth interrogatory. He is a witness for the opposers of the rate, and I take this opportunity of observing, that notwithstanding the excitement in Dudley on the subject of this rate, and the opposition to the rate, all the

witnesses on one side and on the other, the Court has great satisfaction in saying, have given their evidence with the greatest fairness. It is only on matters of opinion on minor points, that there is any material difference between the evidence of the witnesses on one side and on the other.

Mr. Twamley says, that the Town Hall is a convenient and eligible place for such meetings; that the vestry meetings have on some occasions been adjourned to the Town Hall, and occasionally to other places: "I have known them adjourned to the Market Place, and also to the large room at the Bush Inn, and on other occasions to the Infant School room; I do not know or believe that they have ever been held in the body of the church." The vicar, it appears, always resisted the adjournment of the meetings, which are attended with clamour and confusion, to the church; and very properly, as such a place is set apart for divine worship, and is to be held sacred.

Mr. Wood, the brother of the party, proceeded against, on the sixth interrogatory, states that he recollects a vestry meeting adjourned to the Town Hall for the taking of the poll on the election of Churchwarden, in the year 1832; that the Hall being found too small, the meeting was further adjourned to the Market Place below the Town Hall, and that he never recollects any vestry meeting being held in the body of the church; that there have been frequent motions made to adjourn thither, but the chairman never would permit it; that in some cases, the Town Hall is a commodious and eligible place; in others it is not sufficiently large, and that on such occasions the Market Place below has been used.

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With respect to its being private property, no person as I before said, appears to have been prevented from entering the room, nor is it suggested that any parishioner was deterred from proceeding there by an apprehension that he would be excluded. In the *Manchester case*, the Town Hall was equally private property ; no person could be admitted into the Town Hall of Manchester, of right and without leave of the corporation ; yet there was no objection raised in that case, on the ground that the Hall was private property, and that any parishioner had not a perfect right of access to the Town Hall. It has been said that a parishioner could not have a right of action against Lord Ward for any obstruction in entering the vestry room. It is sufficient for me to say, that in the case of "*The King v. the Archdeacon of Chester*," the adjournment to the Town Hall, which was also private property, was held not to be an illegal adjournment. It is proper to fix on a convenient place, and the Town Hall was as convenient a place as could be selected ; there was no reason why any person should have stayed away ; there was not any appearance of obstruction or of any one having been prevented from recording his vote, and no party made any demur at first as to the Town Hall ; they seemed to have acquiesced, and tendered their votes for acceptance there.

There is this observation of Lord Denman (interposed during the argument in that case) "this is not properly an adjournment. May not the chairman appoint a convenient place for taking the poll ? Suppose the whole proceedings had been originally appointed to take place in the church,

and the meeting had been so tumultuous, that it became necessary to remove into the churchyard; would it have been irregular to do so?" And the case seems to affirm the principle of there being a full right to adjourn in a certain event to another place, and no objection was made to the adjournment to the Town Hall. In the present case, the consent of the trustees of Lord Dudley (one of the trustees being Mr. Downing, the party in the cause), may be presumed to have been signified, and the other party at all events acquiesced, for they proceeded there to record their votes.

These two points being disposed of, the only question is, whether the time allowed for the poll was sufficient; and I confess this is the only part of the case on which I have felt any real difficulty. It is not very easy to determine what time should be allowed so as to give every person entitled to vote an opportunity of recording his vote; and all that can be said is, that where no custom exists, a reasonable time should be given, and which I consider is the result of the *Winchester case* (a) which I have adverted to already. But it can hardly be said that it was decided that the time allowed in that case was only a reasonable time for polling one hundred and eighty voters. One hundred and eighty persons only were entitled to vote, and it cannot be contended that the result of that case is, that the whole of the time was necessary for them to record their votes. The question was not as to the time solely, and it was decided that that was a question of custom. Mr. Justice Le Blanc says:—
 "If there had been no custom, there would have

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(a) 7 East, 573.

that there was no guide as to any particular time to be fixed which could avoid all cavil, here eleven hours or eleven hours and a half, are allowed.

The Court has looked to see the number of the parishioners, in order to determine whether the time was sufficient in this case. It has been stated that the number of rate payers (the number entitled to vote) amounted to between one thousand five hundred, and one thousand six hundred: some have calculated the number at one thousand six hundred, and Mr. Shorthouse, who had the best means of forming an accurate judgment of the number, estimates it at one thousand five hundred and fifty. But, on his second examination, his attention having been called to the circumstances, and speaking from the means he possessed, and after the poll had been taken, he states the number of parishioners qualified to vote at no more than one thousand two hundred and twenty-two.

At the commencement of the poll (according to this gentleman's evidence) there was a considerable number of persons not qualified to vote; but during the pendency of the poll, one hundred and fifty persons paid their rates and were thereby qualified to vote; and it has been suggested, that if one hundred and fifty qualified during eleven hours or eleven hours and a half, had the time allowed for the poll been double what was actually allowed, the effect might have been to double the number of votes, that is to qualify three hundred instead of one hundred and fifty, which would have made a majority against the rate. But this, I think, is assuming too much in such a place as Dudley; I do not think that the number of voters could have been much greater, or

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that Mr. Shorthouse would have found the productiveness of his "harvest" materially increased if the poll had been kept open for a longer time.

It has been urged, that time ought to be allowed for every person to qualify himself, to pay his rate and tender his vote. It is true, that if a person qualified himself at the very last moment and tendered his vote, it ought to be accepted. But I do not accede to the proposition, that the time allowed for the poll should be calculated with reference to such a principle. I apprehend that the time need only be fixed so as to allow every person qualified to tender and record his vote, without any reference to what may be done by persons not already qualified. It is no part of the purpose for which a poll is demanded, that it should give time for the payment of the rates, but only to allow persons already qualified sufficient time to tender and record their votes. The question is, was the time sufficient to allow all persons qualified to vote. I think this may, in some measure, depend upon the numbers proved to have voted on former occasions. It is not necessary for the Court to go very minutely into an examination of this point; it is sufficient for the Court to take from the statements of the witnesses what had been the usage in Dudley on former occasions.

Mr. Twamley, in answer to the tenth Interrogatory, states that the greatest number of voters on any previous occasion within his recollection was in the year 1832, when seven hundred and eighty-five persons voted; and the number of votes in the present instance, in the year 1834, was eight hundred and sixty-seven, the number of voters

being seven hundred and forty-eight; in 1832 the number of votes was nine hundred and twenty, and the time allowed was twenty-four hours. Now, assuming the probability that the number of voters would be nine hundred and twenty on this occasion, would not the time have been sufficient to allow every one of these persons to vote if they availed themselves of the opportunity and used due diligence and had attended on the first day? It is to be recollected that there was no surprise, for the commencement and final close of the poll were fixed beforehand. I do not find in any part of the evidence that there was any protest against the sufficiency of the time before the conclusion of the poll on the third day, when the vicar was called upon to extend the time for the poll, and which he declined to do, conceiving that he was bound by the previous notice, and I consider that he was justified in that determination. I think that all depended upon the notice, and that the chairman was bound to abide by it, supposing that the time was a reasonable time.

The number then of qualified voters, who recorded their votes on the present occasion, was seven hundred and forty-eight, and the number of votes recorded was eight hundred and sixty-seven, one hundred and eighty of these votes were given on the first day of the polling, which makes an average of sixty votes for the hour in the three hours of that day.

Mr. Twamley, a witness produced by the parties opposing the rate says, on the fourth Article of the allegation, that at an election of Churchwardens in 1833, four hundred and seventy-four votes were

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taken in six hours, being an average of seventy-nine per hour. The one hundred and eighty votes on the first day were all in favour of the rate, there not having been a single vote tendered against the rate, although several of the opponents of the rate were in the Town Hall, but declined voting on that occasion.

Now if seventy-nine or eighty voters could poll in an hour, as stated by Mr. Twamley, that they did on a former occasion, it is clear, that during the three hours of the first day, sixty more could have voted, which would have made the votes on that day two hundred and forty, taking the votes according to numbers, and perhaps an allowance should be made for an additional number of votes, calculating them according to the value of property, which would make the aggregate number at the close of the poll upwards of nine hundred.

Now it is admitted and proved, that on the first day considerable intervals occurred without any body coming to vote: that a quarter of an hour occurred on several occasions; and it is stated by Mr. Twamley, that ninety votes in an hour is the utmost that could have been taken; but others state that a greater number could have voted,—some say one hundred and fifty in an hour. It is not necessary for the Court to accede to this latter calculation. But Mr. Twamley's calculation, that ninety might have polled in an hour, if due diligence had been used, would give nine hundred and ninety votes during eleven hours, or taking the period allowed as eleven hours and a half, more than a thousand persons might have given their votes, which is a number considerably greater than had polled on any previous occasion. That the

opponents of the rate declined to vote on the first day, when this time was lost, and that it was the effect of concert, is evident, for it is admitted that on the evening of that day a meeting took place of the opponents of the rate, and that it was then resolved to tender their votes on the next day. So that I see no reason, as was urged in the argument, why all these persons might not have kept back their votes till the last day, and have come down to vote on the 27th of September, when there was not time to poll them, and why the same reason might not be brought forward against the validity of the rate on behalf of the persons now complaining of the shortness of the time.

I think, under the circumstances, that the opposers of the rate have not any great reason to complain. Why did they not, before adjourning to the Town Hall, move for an extension of the time? It is not stated that any amendment to such effect was moved, nor that any objection was made as to the shortness of the time at which it was proposed to close the poll. There seems to have been a protest as to the manner in which the question was put,—that on some occasions the question asked of the voters was, whether they voted for the rate or against it? And on some occasions, whether they voted for the motion of Mr. Badger? which included the expunging of the irregular entry recorded in the vestry book. The Court, however, has nothing to do with anything but whether the parties voted for or against the church rate.

But it has been stated, that parties were prevented from giving their votes, and two gentlemen have been produced as witnesses on that point; but

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under what circumstances were they prevented from voting? Mr. Hodnett is a schoolmaster, he attended to poll on the third day, and he states that he was prevented by the crowd before the Town Hall, that though he got into the Hall, he could not get up to the poll; but he deferred it till the last day, and he says that he should not have gone at all if it had not happened that his boys had no school on Saturday, so that he did not show any great zeal on the subject. And Mr. Granger, another person who has been examined as a witness on this point, says that he went to the Town Hall between ten and eleven o'clock, and that he could not get up to the poll on account of the crowd, and he says there were other persons in the same situation; but had these persons attended at an earlier period they might have voted without any difficulty.

There is not, therefore, sufficient evidence to satisfy me that all the parishioners qualified to vote, and desirous of voting, might not, if due diligence had been used, have recorded their votes before the time when it was understood the poll was to cease. To poll ninety in an hour is no great number; some, indeed, think that one hundred and fifty might be polled in an hour; but even if only one hundred were polled in an hour, there was sufficient time for all persons desirous of voting to attend for that purpose. I must say that it would have been more satisfactory if the poll had been kept open till four o'clock of the last day. I see no reason why twelve o'clock should have been fixed for the close of the poll on that day; although something has been thrown out as to its being desirable to close it early on that day as it was market

day ; but I confess it would have been more satisfactory to my mind if the time had been extended to four o'clock in the afternoon of the third day, during which three hours two hundred or three hundred more voters (if required) might have given their votes.

But under all the circumstances of the case I am not prepared to say that this ground of objection, as to the shortness of the time, is sufficient to invalidate the rate made by a majority of the parishioners, no party appearing to have been taken by surprise. Being of opinion, therefore, that the adjournment was legal, that there is nothing with regard to the place to which the meeting was adjourned which renders the rate illegal ; and on the other ground, that there was time enough allowed for recording the votes, if the parties had availed themselves of the opportunity and had used due diligence ; it is the duty of the Court to pronounce for the validity of the rate, and as a matter of course in these cases, to condemn Mr. Wood in the costs of these proceedings.

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CONSISTORY COURT OF LONDON.

The Office of the Judge promoted by
MILLAR and SIMES against PALMER and KILLBY.

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HILARY TERM.
 1st Session.
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MILLAR
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Criminal
 proceedings
 against
 Churchwar-
 dens for "not
 repairing or
 keeping in
 proper order
 the parish
 Church," and
 "for neglecting
 and disobeying
 the lawful
 orders and di-
 rections of the
 Archdeacon."
 The Church
 being still out
 of repair, and
 the Archdea-
 con having or-
 dered the same
 to be repaired,
 not sustained,
 there being no
 proof, that the
 Churchwar-
 dens had per-
 sonally neglected their duty, or that they had wilfully disobeyed the order of the Archdeacon.

Quære, whether a civil proceeding might not have been resorted to.

This was a criminal proceeding, instituted by Robert James Millar and James Simes, as Churchwardens of the parish of St. Alban, Wood Street, in the city of London, (which parish is united with the parish of St. Olave, Silver Street,) against Richard Palmer and William Killby, as Churchwardens of the parish of St. Olave, Silver Street, for not repairing or keeping in proper order, or for not causing to be repaired and kept in proper order, the Church of the said united parishes of St. Alban, Wood Street, and St. Olave, Silver Street; and for neglecting and disobeying the lawful orders and directions of the Venerable Joseph Holden Pott, Clerk, Archdeacon of the Archdeaconry of London, for and in respect of the repairs of the said Church of the said united parishes.

The Articles set forth :—

First.—That by the laws, canons, and constitutions ecclesiastical of this realm, and more especially by the 85th Canon, "the Churchwardens are, and ought, to take care and provide that their parish Churches be from time to time well and sufficiently repaired, maintained, and kept; that the windows be well glazed, the floors kept plain

and even, and all things there in such an orderly and decent manner, without dust or any thing else that may be either noisome or unseemly, as best becomes the house of God," &c.

Second.—That in and by an act of Parliament of the 22nd of Charles the 2nd, intituled, "An additional act for the rebuilding of the city of London, uniting of parishes, and rebuilding of the Cathedral and parochial Churches within the said city," it is enacted, "that the parishes of St. Alban, Wood Street, and St. Olave, Silver Street, shall be united into one parish, and the Church heretofore belonging to the said parish of St. Alban, Wood Street, shall be the parish Church of the said parishes so united;" and it is further enacted and declared, "that notwithstanding such union as aforesaid, each and every of the parishes so united, as to all rates, taxes, parochial rights, charges, and duties, and all other privileges, liberties, and respects whatsoever, other than what are in the said act before mentioned and specified, shall continue and remain distinct, and as they were before the making of the said act."

Third.—That the Church of the said united parishes was, in and throughout the year 1835, and in the months of January and February in the present year, 1836, and now is, very much out of repair, that the masonry of the said Church, and of the tower thereof, is very defective; that the timbers on the north side of the said Church over the north side thereof are much decayed; that the windows and frames thereof, require considerable repair, and that within the said Church, the floor requires to be relaid, and that a great part of the

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pews and internal wood work is in a very decayed state, &c.

Fourth.—That at a joint vestry duly holden, of the inhabitants of the said united parishes in the vestry-room of St. Alban, Wood Street, on the 30th of July, 1835, it was resolved, that it was the opinion of the said vestry that the said parish Church should be immediately repaired, and that a committee be appointed to superintend the repairs thereof, and all matters relating thereto, and that of the said committee be nominated the said Robert James Millar and James Simes, the Churchwardens, and four other inhabitants of the said parish of St. Alban, Wood Street, and the said Richard Palmer, and William Killby, the Churchwardens, and one other inhabitant of the parish of St. Olave, Silver Street; that entries of the said resolutions were made in the vestry book, and were signed by Millar and Simes, and by other inhabitants of the parish of St. Alban, Wood Street, and also by the said Palmer and Killby, and other inhabitants of St. Olave, Silver Street.

Fifth.—Pleaded a copy of the said entries.

Sixth.—Also, that at another vestry holden in the vestry-room of St. Alban, Wood Street, on the 1st of October, 1835, the report of the Committee aforesaid was received, and agreed to, and an entry made in the vestry book, and was signed by Simes, and other inhabitants of St. Alban, Wood Street; that Palmer and Killby were then and there present, and refused to sign such entry.

Seventh.—Pleaded a copy of the said entry.

Eighth.—That Palmer and Killby were sworn into the office of Churchwardens for the parish of

St. Olave, Silver Street, in the month of May, 1835, for the year thence next ensuing, and that at the parochial visitation on the 21st of October, 1835, the Venerable Joseph Holden Pott, the Archdeacon, in consequence of a presentment then made by Palmer and Killby, that the Church was not in good and substantial repair, &c., and after a personal inspection of the said Church by the said Archdeacon, ordered that the repairs should be undertaken without further delay, and monished and directed the said Palmer and Killby, as well as the said Robert James Millar and James Simes, to carry the said order into effect, and to certify the performance thereof at the then next visitation, and that an entry of such order was duly made in the visitation book kept in the registry of the said Archdeaconry.

Ninth.—Pleaded a copy of the presentment and of the act entered in the visitation book.

Tenth.—That the Committee appointed to superintend the repairs of the said Church, at a joint vestry of the united parishes on the 30th of July, 1835, having approved of and accepted the estimate and proposal of Ebenezer Simes, for the repairs of the said Church, Millar and Simes gave directions that a contract between Ebenezer Simes and themselves, on behalf of St. Alban, Wood Street, and the said Palmer and Killby, on behalf of St. Olave, Silver Street, for the purpose of proceeding with the necessary repairs of the said Church, should be prepared.

Eleventh.—That William Hull, the vestry clerk of St. Alban, Wood Street, wrote and addressed a letter to Palmer and Killby on the 12th of February, 1836, by desire of Millar and Simes, stating

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that the proposal of Ebenezer Simes for the repairs of the said Church had been accepted by the Committee, and that he was desired by the Churchwardens to say that they were ready, on the part of their parish, to enter into the requisite contract with him for the purpose of proceeding with such repairs; and further, to request their (Palmer and Killby's) concurrence, as Churchwardens of St. Olave's parish, in carrying the same into effect, by their becoming parties to such contract; and that in reply thereto, Palmer and Killby addressed a letter on the 18th of the said month to the Churchwardens of St. Alban, Wood Street, (and which was by them duly received) declining to sign such contract.

Twelfth.—In supply of proof, annexed Messrs. Palmer and Killby's letter.

Thirteenth.—That by reason of the premises and their refusal to sign the contract, and to concur and co-operate with the said Millar and Simes in carrying the repairs of the said Church into effect, the same still continues in want of the said hereinbefore recited repairs, and daily suffers great damage, and if not timely provided against will grow much more ruinous and decayed, and that such their neglect was in manifest violation of the laws, canons, and constitutions of this realm, &c.

Phillimore and Haggard in support of the Articles.

Addams and Curteis *contrâ.*

JUDGMENT,

Dr. Lushington.—In this case the office of the Judge is promoted by the Churchwardens of the parish of St. Alban, Wood Street, *against* those who

were the Churchwardens of St. Olave, Silver Street, in the year ending at Easter, 1836. The decree bears date, the 22nd of March, and was returned into Court on the 28th of April, 1836.

The præsertim of the decree is for "not repairing or keeping in proper order the Church of the united parishes of St. Alban, Wood Street, and St. Olave, Silver Street, and for neglecting and disobeying the lawful orders and directions of the Archdeacon."

The prayer is, that the Court will pronounce it to be proved that the Church was and is out of repair, and that the parties proceeded against, had neglected the orders of the Archdeacon; that they, or in the alternative, the present Churchwardens, may be monished to repair the Church. Part of this prayer may at once be disposed of, so much as relates to admonishing these parties to repair the Church; one of them it is admitted is no longer Churchwarden, against him, therefore, I conceive it to be impossible there could be any such monition; when a monition issues against a person to do an act, the act required to be done must not only be lawful in itself, but such as he has power and authority to do. The office of Churchwarden having ceased, the power of one at least is at an end; and not only has he now no power to act, but it would be illegal in him to interfere otherwise than as an ordinary parishioner.

It does not appear before the Court that the other party proceeded against has again been elected Churchwarden, but if it did, I should greatly doubt, and indeed think, I could not direct such a monition against him as a party prosecuted, by reason of being Churchwarden the preceding year.

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What may be done with respect to the existing Churchwardens I will consider presently.

The remainder of this suit, then, involves the trial of the following issue.—Whether the Churchwardens proceeded against, have neglected their duty by not repairing, and by wilfully disobeying the orders of the Archdeacon. This is not a civil question, nor is it brought before the Court in that shape, there is no civil question to try; true, that a doubt may exist as to the proper application of funds left to the parish of St. Alban, but as to that point, this Court has no jurisdiction; the Court of Chancery alone is competent to decide such questions; nor have I any authority to compel Churchwardens to repay a sum of money. The question, therefore, appears to me to narrow itself to this, whether the Churchwardens are guilty or not guilty of a breach of duty cognizable by this Court.

It may here be well to state my notion of the authority and power committed to this Court, both as to Churchwardens and the repair of the Church, so far at least as I can safely do so with adequate light from authorities to be depended upon.

The present case is somewhat complicated, from there being an union of two parishes, but to take the case of an ordinary parish. If the Church be *out of repair*, and *a fortiori*, if the Archdeacon order the repairs, I apprehend that *according to circumstances*, there are two modes of proceeding open, according to circumstances; for I am of opinion that the two modes of proceeding cannot be resorted to indiscriminately. First, if the Churchwardens are wilfully disobedient, and neglect to take all the clearly legal means in their power to have the Church re-

paired, a *criminal* proceeding may properly be instituted against them. I conceive this Court has adequate authority to punish any neglect of duty committed to their charge.

Secondly, I apprehend that if no fault is ascribed personally to the Churchwardens, but a question arises as to the *propriety of the repairs*, or if the Churchwardens do, or are willing to do their duty, but obstacles out of their power intervene, then the proper mode of proceeding is in the *civil form*; I have come to this opinion, partly from precedent and partly on principle. In the case cited, of *Lord Maynard v. Brand*, (a) Dr. Swabey stated in his argument, that proceedings might have been taken in the civil form, which was not denied by the Court. For instance, if to a monition, calling upon the Churchwardens to repair the Church, they should return that they had called a vestry, and that *such vestry refused a rate*; so far, I think, the Churchwardens would be *exculpated*, for nothing is more clear than that they are not bound, and that is illegal in them to expend their own money or to incur debt. (b) The question would then arise, whether by law Churchwardens are enabled, and this Court can compel them to make a rate against the vote of vestry by their own authority, or whether, if matters came to that pass, the more proper course would not be to resort to the superior authority of the Court of King's Bench. This, which is one of the most important and difficult questions which has ever come before the Court, has not been attempted to be argued on the present occasion, and I shall give no opinion upon it; indeed it would

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(a) 3 Phill. 501.

(b) *Northwaite v. Bennett*, 4 Tyrw. 236.

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be impossible for the Court to express any opinion upon it, until it had been most deliberately and maturely considered.

To come back then to the only question I have to determine: Have the Churchwardens been guilty of a dereliction of duty?—It must not be forgotten that it is one of the first principles of criminal justice, that the accuser must prove his charge. Now the whole substance of the Articles is this:—

First, that the Church is out of repair, and

Secondly, that in October, 1835, the Archdeacon ordered the repairs to be done.

What is the delictum charged? that the Churchwardens *refused to agree to the report of the committee* appointed to consider what repairs were necessary, and that they *refused to sign a contract*.

These are the special breaches of duty alleged, but I am not prepared to say that they were bound to do either one or the other. I do not know that it has even been contended that the Churchwardens are bound to do these acts, I think it could not be contended with effect.

I am of opinion, therefore, that these two *special charges* fall to the ground.

What then remains? Can I, because the Church is out of repair, and the Archdeacon has made an order to repair, *infer wilful disobedience*? it appears to me that every principle of justice militates against such an inference. The *special charges* of delinquency are no *charges at all*. If the Churchwardens have failed in their duty, why were not the particulars stated; for instance, if they refused to call a vestry to make a rate, or having money in hand refused to repair, that would have been a sub-

stantive charge, it would have been a neglect of that which was in their power, and was a part of their duty.

There is no such charge made, but it does appear, though not very distinctly, from the exhibits numbers two and four (the only exhibits proved in the cause) that a vestry was called to make a rate; what was done at that vestry does not clearly appear, even, therefore, were it possible to presume, *in the absence of evidence*, that the Churchwardens had been guilty of neglect of duty in not calling a vestry to make a rate, here such presumption would be *against the evidence*.

It is not alleged that the Churchwardens had *money in hand*. I am then of opinion, that unless the mere fact of a Church being out of repair would justify this Court in punishing Churchwardens; there is no delictum proved in this case, and therefore I must dismiss the defendants.

I think also I am bound to give them their costs. I think it would be injustice to persons compelled to perform public duties, and whom the law, as in the case of magistrates and constables, protects, to allow them to be sufferers where no criminality attaches, or at least is proved to attach upon them, and I do not conceive that this prosecution could, from the time at which it commenced, ever have answered any purpose. The decree being returned on the 28th of April, and the new Churchwardens having been chosen on the 30th of April, and sworn on the 15th of May, it was manifestly impossible the monition could be enforced against them.

As to the alternative, to decree a monition against the present Churchwardens, I cannot en-

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graft such an order on these proceedings, but on an affidavit, stating that the Church is out of repair, and the order of the Archdeacon, I will grant a monition against them to shew cause.

ARCHES COURT OF CANTERBURY.

1837.

EASTER TERM.
3rd Session.
May 1st.

MILLAR
and
SIMES
against
PALMER
and
KILLBY.

In criminal
suits an appeal
is allowed to
the party prose-
cuting as well
as to the de-
fendant.

From the above decision an appeal was prosecuted to the Arches Court, and an inhibition and citation were taken out, to which an appearance was given on behalf of Messrs. Palmer and Killby, under protest; and their proctor alleged, in an act on petition, "that a certain cause or business was lately depending in judgment in the Consistorial and Episcopal Court of London, of the office of the judge promoted by Robert James Millar and James Simes, as the Churchwardens of the parish of St. Alban, Wood Street, in the city of London, *against* Richard Palmer and William Killby as Churchwardens of the parish of St. Olave, Silver Street, in the said city of London, to answer to certain articles, heads, positions, or interrogatories, touching and concerning their souls' health, &c.; and more especially for not repairing and keeping in proper order the Church of the united parishes of St. Alban, Wood Street, and St. Olave, Silver Street, and for neglecting and disobeying the lawful orders and

directions of the Venerable Joseph Holden Pott, clerk, Archdeacon of the Archdeaconry of London, for and in respect of the repairs of the said church, &c. ; and that the Worshipful Stephen Lushington, &c., did, on the first session of Hilary Term, to wit, Tuesday, the 17th day of January, in the present year, 1837, having theretofore heard advocates and proctors on both sides, and having deliberated thereon, at the petition of the proctor of the said Richard Palmer and William Killby by his interlocutory decree, dismiss the said Richard Palmer and William Killby from the said suit, and from all further observance of justice therein ; and did also at the further petition of the said proctor, condemn the said Robert James Millar and James Simes in the costs of the said suit, and the said proctor humbly submitted that such interlocutory decree was final and conclusive of such proceedings, and that it was not, and is not competent to the said Millar and Simes, or their proctor to appeal therefrom, and that the inhibition and citation issued under seal of this Court have been so issued in error, and unduly, wherefore he prayed, &c.

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EASTER TERM.
3rd Session.
May 1st.

MILLAR
and
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KILLBY.

Addams and *Curteis* on behalf of the parties proceeded against, contended that in criminal proceedings no appeal was allowed to the prosecutor ; that the present protest was analogous to the plea of *autrefois acquit* (a) at common law ; that to be twice tried for the same offence, was contrary to the spirit and practice of the law of England ; and they referred to the case of *Hiett against Hinckes*

(a) 4 Blackst. 335.

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EASTER TERM.
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and Greenbank in the Delegates in 1726, (a) where the judge of the court below (the Chancellor of Worcester) said, "he should act more discreetly in giving sentence against than in dismissing him (the defendant,) as it being a business of office should I err in dismissing him he may escape the justice of the law, for my superiors there cannot reach him, whereas, if I err in giving sentence against him, an appeal to them may relieve him."

Phillimore and Haggard contra.

SIR HERBERT JENNER.

I accede entirely to the maxim stated by the counsel that a party shall not, for the same offence, be put on a second trial; but it appears to me that this is not a second trial, but a continuance of the same trial, and I am of opinion that an appeal is allowed equally to a promoter as to a defendant. With regard to the case referred to in the Court of Delegates; it certainly appears to have been the impression of the judge of the court at Worcester in that case, that there was no appeal to a prosecutor in a criminal proceeding; that was the only case cited, and the Court may observe, that it forms no binding authority on this Court; and several cases in the Court of Delegates were cited, in which the original promoters were the appellants.

The Court then, after referring to the cases of *Daw and Nockolds against Williams*, (b) Foote

(a) No. 927, in the Catalogue of the Processes in the High Court of Delegates.

(b) 2 Add. 130, and ex parte Williams, 4 B. & C. 313.

against Richards and Bartlett, (a) and Austen against Dugger, (b) observing that the latter was a direct precedent, overruled the protest, assigned the parties to appear absolutely, and condemned them in costs.

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EASTER TERM.
3rd SESSION.
May 1st.

MILLAR
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The cause then proceeded in the usual way, and on the 29th of June, 1837, judgment was given.

SIR HERBERT JENNER.

After stating the proceedings, and that the learned judge of the court below had dismissed the parties, proceeded. I understand that the learned judge was of opinion that Churchwardens are not liable to be proceeded against criminally, unless for personal and wilful neglect; and this is agreeable to a passage in Lyndwood, which it is proper to state at length, as it is a principle on which this Court is inclined to act; it is in the note under the words *sub pœnâ*, in page 53, the first Book, title 10, under the head, “*Ecclesiarum reparationi debitæ Archidiaconus invigilet;*” the words are these: “*Sed* “*nunquid guardiani ecclesiæ ad hujusmodi re-* “*parationem faciendam, et alias ad bona ecclesiæ* “*disponenda electi, possunt per pœnam hujusmodi* “*sc. excommunicationis vel suspensionis aut per* “*pœnam aliam, compelli ad reparationem, de quâ* “*hic dicit, æstimo quod si sufficienter habere pos-* “*sunt unde fiat reparatio hujusmodi, tunc si circa* “*hoc negligentes extiterint, possunt per censuram* “*ad hoc compelli. Alioquin si per eos non steterit,* “*non esset contra eos sic procedendum;*” and to

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Held, that in order to justify criminal proceedings against churchwardens for neglecting to repair their parish church, it must be shewn that they have been guilty of personal and wilful neglect, affirming the sentence of the Consistory Court of London.

(a) Cases temp. Lee, 265.

(b) 3 Phill. 120.

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the word *sufficienter*, there is this note in the margin, "habeant in manus vel eorum diligentia sufficienter habere possint unde," &c. (a) This clearly shews that Churchwardens may be compelled by ecclesiastical censures, to perform the repairs for the necessary sustentation of the church, if they have the means of defraying the expense, and that such proceeding against them is for a *wilful neglect* of their duty; now the facts proved in this case are, first, that the church is out of repair; secondly, that the Archdeacon had ordered the repairs to be done and certified; and thirdly, that the Churchwardens of St. Olave, the parties proceeded against, had declined to sign the contract entered into by the Churchwardens of St. Alban for doing the repairs; *prima facie*, therefore, a reasonable case is made out against them; it is necessary then to see whether this is rebutted by anything which appears in the proceedings, as there may still exist no real imputation of wilful neglect and disobedience against them. The estimate of the cost for the repairs for which the contract was made, was £3000, of which the parish of St. Olave was to pay one-third; the proportion payable by St. Alban parish, it appears was not to be raised by rate, but from funds left by the will of a Mr. Savage; St. Olave's proportion, however, was to be raised by rate; it appears that a great part of the parishioners of the latter parish are in indigent circumstances, the rate would therefore fall very heavily on them, and it seems that they thought that they had a right to participate in the funds under Mr. Savage's will, which were bequeathed

(a) Lyndwood's Provinciale, lib. 1, tit. 10, p. 53.

for the repair of the church ; now this Court is not competent to determine that point ; and if it were it could not do so upon the evidence now before it ; the only purpose for which the Court refers to this is, to see whether it affords any reasonable ground for the parish not immediately ordering the repairs, and for the Churchwardens not making themselves personally liable to the payment of £1000, by signing the contract ; the Churchwardens were not bound to expend their own money, nor to undertake the repairs until the funds were provided ; and if they called a vestry, as it appears they did, I cannot say that they have been guilty of wilful neglect ; they attended the vestry, and they refused to confirm the report, and to sign the minute ; and I do not think that they were bound to do so, being dissentients, although they were of course concluded by the act of the majority, the only step which they could have taken was to do that which it might be a matter of great doubt whether they could legally do, namely, make a rate of themselves, without the parishioners.

The Court has not that question before it, and will give no opinion upon it : but even supposing the Churchwardens had the power to make a rate, if the vestry refused, still, before the Court would punish them for neglecting to do so, it would require that the repairs should be shewn to be *absolutely necessary* ; it appears, however, in this case, that the church has been surveyed by another skilful professional gentleman who estimated the necessary repairs at £900 ; and this great difference between the estimates might naturally induce some

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hesitation before entering upon such an expensive undertaking.

Looking then at all the circumstances of the case, and agreeing in the view taken by the learned Judge of the Court below, I cannot say that the Churchwardens have been guilty of any wilful disobedience, or culpable neglect.

Sentence of the Court below affirmed, with costs.

CONSISTORY COURT OF LONDON.

LITTLE HALLINGBURY, ESSEX.

1837.

HILARY TERM.

1st SESSION.

Jan. 17th.

The balance of a sequestrator's account remaining in the registry, upon the death of the incumbent, who had been discharged under the Insolvent Debtors' Act, and an assignee appointed, directed to be paid to the assignee, although no personal representative was before the Court; the balance being vested in the assignee under the Insolvent Act.

This was an application to the Court for the payment of the balance of a sequestrator's account of the sequestration of the Rectory of Little Hallingbury, to be paid out of the registry to Mr. Samuel Fiske, the assignee, under the Insolvent Act, of the estate and effects of the Rev. John Stewart, the late Rector, now deceased, and who was an insolvent debtor discharged under that act.

On the 24th of December, 1834, sequestration of the profits of the living issued to satisfy a debt of £1006 18s., which had been recovered in an action against the late rector. The sequestrator, at

the time of the late Rector's death, had a balance in hand amounting to £81. 11s. 6d., which he paid into the registry.

The late incumbent was discharged under the Insolvent Debtors' Act (a) on the 11th of March, 1835, and died on the 14th of that month; at his discharge, Mr. Fiske became his assignee, in trust for the benefit of his creditors. Mr. Fiske, as assignee, now claimed the balance in the registry. Mr. Burton, a builder, claimed £26. for repairs done by him to the rectory house previously to the deceased's death; these repairs he stated to have been done in obedience to the orders of the Bishop of London.

And the present Rector had a claim for upwards of £300. for dilapidations.

Haggard moved the Court to pay the balance in the registry to Mr. Fiske, the assignee, under the Insolvent Debtors' Act.

DR. LUSHINGTON.

This sum is the surplus of the proceeds of the living, after satisfying a sequestration, and would be payable to the deceased, had there been no insolvency.

The only question is, to whom can this money be legally paid? With regard to the claim of the present incumbent for dilapidations, he can only come in like any other creditor. There is one sum stated to have been laid out in the lifetime of the

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(a) 7 Geo. 4, c. 57, continued by 1 Wm. 4, c. 38, and 2 Wm. 4, c. 44.

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deceased, by order of the Bishop; if that was ordered by the sequestrator it would be his debt.

I at first entertained some doubt whether this money could be paid to any other person than the personal representative of the deceased, or at least whether there must not be a personal representative before the Court; but on a careful view of the Insolvent Debtors' Act, I am of opinion that it belongs to the assignee, and that no necessity exists that there should be a personal representative. I therefore direct it to be paid to him.

CARDEN *against* CARDEN.

1837.

EASTERN TERM.
1st Session.
April 22nd.

CARDEN
against
CARDEN.

Before the Court will pronounce a party in contempt, for the purpose of proceeding in a cause, the residence of the party must be fixed within the jurisdiction of the Court, at or before the issuing of the citation.

This was a cause of divorce brought by Sarah Carden against Henry Carnagie Carden, her husband, by reason of adultery and cruelty. On the Bye-day after Michaelmas Term, 17th December, 1836, the proctor for the wife returned the citation; the officer not having been able to serve the same personally, a decree by ways and means issued at his prayer; this decree was served at No. 11, Carey Street, the last known residence of the husband, and also on the parish Church, a copy being likewise left at the residence of the brother of the husband, and was returned into Court on the first session of Hilary Term. The wife having, while at Boulogne, received a letter from Mr. Carden, in which he stated his address

to be at Mrs. Bate's, No. 18, Paddington Street, Marylebone, London, a further decree by ways and means was extracted and served at her house, and also on the parish Church of Marylebone, and returned into Court.

On the first session of Easter Term, 22nd of April, 1837, the proctor for the wife prayed the Judge to pronounce the husband in contempt, for the purpose of carrying on the proceedings against him in *pœnam contumaciæ*.

THE COURT.

There is nothing here to show that the party proceeded against ever had any residence in the diocese. If you once fix the residence before the citation issues, the Court will presume a continuance of it until the contrary be shown. Upon an affidavit being brought in, that the party had his residence in London before the service of the citation, the Court may proceed with the cause.

The Court, on a subsequent day, upon such an affidavit (a) being brought in, pronounced the husband in contempt, and the cause was carried on in *pœnam*.

(a) The affidavit of Sarah Carden, the wife, after reciting the service of the citation at No. 11, Carey Street, in the parish of St. Clement Danes, and also on the parish Church, &c., proceeded; "and this appearer further maketh oath, and saith, that she hath made diligent inquiry, and hath ascertained that the said Henry Carnagie Carden, shortly prior to, if not at the very time of, the service of the aforesaid citation and decree by ways and means, was resident at No. 11, Carey Street, aforesaid, and that she hath no reason to believe, and does not believe, that he hath since had any other fixed residence or domicile, &c. &c." And two letters were annexed to the affidavit, the one from Mr. Carden, and the other from Mr. Jones, his agent, from which it appeared that he was cognizant of these proceedings.

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CARDEN
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WALKER *against* WALKER.

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This was a cause originally of divorce by reason of cruelty, promoted by the wife against the husband ; by way of defence, the husband gave in an allegation, charging the wife with adultery ; and the wife in reply to that, also pleaded adultery by the husband.

In the course of the proceedings, alimony was allotted to Mrs. Walker *pendente lite*, at the rate of one pound per week.

In January, 1835, Mr. Walker, who was a watchmaker in Oxford Street, assigned the whole of his property to trustees for the purpose of paying his creditors a composition of six shillings in the pound ; one creditor, however, refused to take the composition, and arrested Mr. Walker ; in July, Walker took the benefit of the Insolvent Debtors' Act ; and he now prayed to be allowed to carry on the proceedings in *formâ pauperis* : he had been pronounced in contempt for non-payment of alimony and costs, and a *significavit* had issued, but he was purged of his contempt by reason of his discharge by the Insolvent Debtors' Court.

Addams, on behalf of the wife, opposed Mr. Walker's prayer to be allowed to carry on the proceedings in *formâ pauperis*, on affidavits, stating that he had a real interest in two of the best stalls at the Pantheon Bazaar, and which had been

colorably transferred to Mary Codey, a female with whom he was constantly associating; that he lived in respectable lodgings, and frequently gave entertainments to his friends; and that he had declared that he never would pay his wife's alimony or costs.

He further contended that Mr. Walker being a skilful workman, in his business of a watchmaker, he could thereby obtain a livelihood, and therefore, that he had no right to the privilege of suing in this Court as a pauper.

Phillimore for Mr. Walker.

Mr. Walker having been released from prison under the Insolvent Debtors' Act, his property vested in his assignee, and he himself clearly was possessed of no property whatever. And Mr. Walker swears that he has applied to several watchmakers for employment, who have all refused to employ him while this suit was going on. With respect to the declaration imputed to Mr. Walker, he declared that it was not true that he had stated that he would not, but that he had merely said that he *could* not pay the alimony and costs: he, therefore, prayed the Court to admit his party to proceed as a pauper.

DR. LUSHINGTON.

The effect of Mr. Walker's discharge under the Insolvent Debtors' Act is, that the whole of his property became vested in the assignee; up to that time, therefore, (July, 1835) he must be considered to be destitute of all property. It becomes necessary, then, to see whether the party has ac-

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A party, who by his business or profession is capable of obtaining a livelihood, although in the possession of no property, is not entitled to proceed in *forma pauperis*.

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quired any property since, or whether he is in a condition to acquire any; for if so, he is not entitled to proceed as a pauper. In *Lovekin v. Edwards*, (a) Sir John Nicholl observed, "To sue as a pauper is a great privilege of law, it belongs only to the necessity arising from absolute poverty, and from the absence of any other mode of obtaining justice; no person is entitled to the gratuitous labours of others who can furnish the means of providing them for himself; besides, it places the adverse party under great disadvantages, it takes away one of the principal checks upon vexatious litigation; the legal claim to so great a privilege ought therefore, to be clearly made out. It is a complete, but not an uncommon misapprehension of the law to suppose, that because a person is in insolvent circumstances, and because he can truly and conscientiously swear that he is not worth five pounds after all his just debts are paid, that, therefore, he is entitled to be admitted, or rather, to proceed as a pauper; it is *prima facie* ground to admit him as such, but no more; if it were otherwise, many persons living in great splendour and luxury would be so entitled; for many persons in business, in the enjoyment of an immense income, and maintaining a proportionate expenditure, would not be worth five pounds after the payment of their just debts." In this case it appears that Mr. Walker was brought up as a watchmaker, and it is alleged that he has the means of getting his livelihood as such: he has, however, on the other hand sworn that his connexions in the trade have, one and all, refused

(a) 1 Phill. 183.

d. H. G. A.

J. J. 1843.

to give him employment until, to use their words, "he is freed from the worthless and disreputable connexion to which he is tied." And he states that he is living upon the charity of his friends. I cannot but express my dissatisfaction with this averment, and the affidavit by which it is supported; it is highly improbable that a person should be refused employment on such grounds. Is the Court to believe, without any corroborative evidence, that Mr. Walker had been to persons of respectability, and that they all had given the same answer? It is irreconcilable with common experience, and incredible, that diligent and skilful workmen should be refused employment in consequence of connexions, however disreputable.

Being then of opinion that Mr. Walker is possessed of sufficient skill and knowledge of business to obtain adequate employment and remuneration, it is my duty to reject the present application.

The cause then proceeded in the regular course: witnesses were examined, and publication passed, and Walker prayed the Court to fix a day for hearing the cause.

The proctor of the wife, on the contrary, prayed that his costs might be taxed against the husband, and that the cause might not be heard until those costs were first paid.

Addams, for the wife. The proceedings have been all regular, and in the usual course: the husband had applied to sue in *forma pauperis*, and that application having been rejected, he must pay his wife's costs as in all other cases of the kind; if

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the Court were to accede to the husband's prayer, it would be an extreme hardship on the proctor for the wife, who would not, by the payment of the present costs, be reimbursed the whole sum paid by himself out of pocket, as by Mr. Walker's release under the Insolvent Debtors' Act in July, the costs up to that time were all lost; should the Court refuse to enforce payment of these costs, it might do the same in any case of a similar kind.

DR. LUSHINGTON.

The Court refused to tax the costs of the wife against the husband, he being possessed of no property whatever, and having been shortly before discharged from prison, as an insolvent debtor, although not proceeding in *forma pauperis*, but declined, at his prayer, to appoint a day for hearing the cause.

It is unquestionably the general practice, that the husband must pay the costs incurred by the wife; but that rule is liable to some modifications; where, for instance, the wife has a separate income. In the present case the wife is not shown to be possessed of any property; and the husband, it appears, during the proceedings, has been discharged from prison by an order of the Insolvent Debtors' Court, by which, whatever property he possessed became vested in the assignee of that Court.

The prayer of the proctor for the wife is, that his bill may be taxed, and that the cause may not be heard until his costs are paid; the husband, on the contrary, prays that the cause may be appointed for hearing, and the question is, what, under the existing circumstances of the case, ought the Court to do?

I apprehend, if I proceed to the length of taxing this bill, I must direct a monition for the payment of it, and proceed, if the costs are not paid, to pronounce Mr. Walker in contempt, and to decree a *significavit* to issue, the result of which would be that he would be committed to prison, and could not be released unless he paid those costs, or again

obtained his discharge under the Insolvent Debtors' Act.

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It may be true, that in ordinary cases the Court does not inquire into the circumstances of the husband, but there is no authority to shew that it might not be the duty of the Court to make such inquiry.

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If the fact of the husband's inability to pay the costs rested entirely upon his affidavit, the Court would hesitate to take notice of it, but here there are facts in the cause showing, that although the husband is not entitled to sue in *forma pauperis*, still, that he is only earning from twenty to twenty-five shillings a week; that previously to these proceedings he had been a bankrupt, and that subsequently he had been discharged by the Insolvent Debtors' Court, by which he was entirely divested of all property. Is there anything to show that the party has since acquired any property by which he can discharge these costs? He has sworn that he has not, and there is no evidence adduced to the contrary.

I am to consider then, whether I must enforce these costs against this party thus unable to pay them. I do not think that I am called upon, in justice to the wife, to accede to her prayer, and I, therefore, decline to comply with it; on the other hand I shall not fix any day for the hearing.

The cause subsequently came on for hearing, and the Court being of opinion that cruelty of the husband was clearly and distinctly established, and that the charge of adultery against the wife was unsupported by any credible evidence, pronounced for the divorce.

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EASTER TERM.
2nd Session.
April 29.

BRUERE *against* BRUERE.

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TRINITY TERM.
1st Session.
May 27th.BRUERE
against
BRUERE.

The husband being an insolvent debtor, and possessed of no property, and in no business or profession, the Court refused to make any allotment of alimony to the wife, although the father of the husband had considerable property, and had supported his son. But the Court suspended the proceedings until something by way of maintenance should be given to the wife.

This was a cause of divorce by reason of adultery, brought by the husband against the wife; the present application was for alimony *pendente lite* to the wife. The husband had been discharged under the Insolvent Debtors' Act, and was possessed of no property, and in no business or profession; upon the death, however, of his father, he would be entitled to certain property.

Addams and *Robinson*, for the wife. The husband being entitled to an estate in reversion, after his father's death, cannot be said to be without means, and he is supported now by his father, and there can be no doubt, that if the Court were to allot alimony to the wife, that the husband's father would pay it; they, therefore, prayed the Court to make some allowance to the wife.

The King's Advocate and *Phillimore*.—The husband is in possession of no property, and has no income, nor has he the means of acquiring any income being in no profession; but it is said, that if the Court allotted alimony to the wife, that the father of the husband would pay it; if it had been alleged that the wife was living with her friends, the Court would not take notice of it, nor can it with respect to the husband.

How can the Court, out of nothing, compel any payment? and in this case, the wife is charged with adultery, which she does not deny, but says the husband connived at it.

DR. LUSHINGTON.

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The question is, whether I can make any allotment of alimony to the wife? The Court cannot enter into the circumstances of the case. In this stage of the cause, I cannot take any of the averments to be true.

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1st Session.
May 27th.

BRUERE
against
BRUERE.

Upon advertng to the allegation of faculties and the answers of the husband, it appears that Mr. Bruere will be entitled to an income after his father's death, and that he has taken the benefit of the Insolvent Act, and it does not appear whether the property would be sufficient to discharge his debts. Under such circumstances, when the party is an insolvent debtor (or an uncertificated bankrupt) it is not competent to the Court to make any order for alimony.

But under all the facts stated, I think that in future some allotment ought to be made. The course which I shall pursue is this, I shall stay the proceedings until some small sum by way of maintenance is afforded to the wife.

1837. PREROGATIVE COURT OF CANTERBURY.

TRINITY TERM.
2nd Session.
June 2nd.

REYNOLDS
against
THRUPP
and
THE
EAST INDIA
COMPANY.

REYNOLDS *against* THRUPP *and* THE EAST INDIA
COMPANY.

Of two papers of the same date propounded as codicils, one pronounced against, and the other established, the former interfering with the disposition of the property contained in the deceased's will, to which he was shewn to have adhered generally, and the real intention of the deceased being on the face of the paper doubtful, the latter being a simple and intelligible instrument, clear upon the face of it.

This was a cause of proving in solemn form of law, three papers, marked No. 1, No. 2, and No. 3, containing together a codicil to the will of Robert Mitford, deceased.

The testator died on the 21st of April, 1836, at Paris, leaving his widow, and a brother and sister, the only persons entitled to his personal estate, in case he had died intestate.

On the 21st of July, 1835, the deceased made his will in his own handwriting; this will was attested by three witnesses, and Mr. H. R. Reynolds and Mr. Thrupp were the executors named in it; this will was not opposed. The papers propounded were without date, but were written by Mr. H. R. Reynolds, the husband of the deceased's niece, on the day before the testator's death, under the circumstances stated in the judgment of the Court.

No. 1, was as follows:—

My property, which is fixed and must be paid, is £600 a year to my wife, but upon her death £4800 as by her settlement, will return to me, now I left Mrs. Jane Bearcroft, I think, £100 a year during her life. Now the interest.

No. 2.—I make this a codicil to my will, Ann

and yourselves must sink every thing for your own use.

No. 3.—This is a codicil to my last will. “ I give my servant George one hundred pounds.”

The King's Advocate and Lushington for Reynolds.

Phillimore and Haggard for Thrupp.

Burnaby for the East India Company.

Addams for Mrs. Johnson.

Blake for the Widow.

SIR HERBERT JENNER.

In this case, three papers are propounded as codicils to the will of Robert Mitford, who died on the 21st of April, 1836, at Paris. The papers are without date or signature ; they were written on the day before the death of the deceased, by Mr. Henry Revell Reynolds, Junr., the husband of the testator's niece, and one of the executors named in his will. The will, which is not opposed, is in the deceased's own handwriting, it is drawn up with much particularity and with great care, so as to leave no doubt as to the real intentions of the deceased at the time it was executed, and the reasons are fully set forth for the dispositions contained in it.

Although the executor represents the interests of all the legatees under a will, still, as in the present case, Mr. Thrupp had no personal interest whatever in the result of the question now before the Court ; when this case was ready for hearing,

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TRINITY TERM.
2nd Session.
June 2nd.

REYNOLDS
against
THRUPP
and
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TRINITY TERM.
2nd SESSION.
June 2nd.

REYNOLDS
against
THURFP
and
THE
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the Court directed that it should stand over, in order that the parties interested might be brought before the Court, and I do not regret that that course was adopted in this case, but I desire that this may not be considered as forming a precedent that generally all parties are to come before the Court.

The Court has now before it a number of parties. Mrs. Reynolds, the niece of the deceased ; the East India Company, who are trustees of the residue under the will ; Mrs. Johnson, a legatee in 10,000*l.* ; and Mrs. Mitford, the widow ; in fact, all persons are now before the Court who might possibly be interested in the present question.

The deceased had been separated from his wife, and the will commenced by reciting that in 1832, when he separated from her, a settlement of 600*l.* a-year was made upon her, in addition to the interest she took under her marriage settlement ; namely, 20,000 sicca rupees. It also assigned reasons (which it is unnecessary to state) why no bequest was made in favour of his brother, the Reverend J. Mitford ; it bequeathed to his nephew, 2000*l.*, and a moiety of a real estate, which the deceased held in common with his brother ; to his sister, Mrs. Reynolds, 2000*l.* ; to Miss J. Bearcroft, an annuity of 100*l.* ; to Mrs. Johnson, 10,000*l.* Another legacy was afterwards obliterated by the deceased, and a memorandum written by him, that he had cancelled the bequest on the ninth of December, 1835 ; but in all other respects, that he confirmed the will. The residue of the property (after deducting the annual amount necessary for the keep of his horses, which were to be pensioners)

was given to the government of Bengal, to be applied to charitable, beneficial, and public works in the city of Dacca in the East Indies, for the benefit of the native inhabitants of that city in the manner in which the Bengal government might consider best conducive to that end. This bequest was expressed in terms clear, distinct, and precise. Mr. H. R. Reynolds, Junr. and Mr. J. W. Thrupp, the deceased's solicitor, were appointed executors and trustees with legacies of 1000*l.* each. The will further stated, that whatever alterations should become necessary, would be supplied by a codicil, and that in the event of the lapse of the wife's annuity, and the legacy to Miss Bearcroft, they should go into the residue given to the government of Bengal. The will was attested by three witnesses, and was deposited by the deceased in the hands of Mr. Thrupp.

In March, 1836, the deceased went to Paris, accompanied by his servant George Chenery, where he died on the 21st of April. Soon after his arrival he became ill, and being informed of his danger, he requested Dr. Morgan, his medical attendant, on the 14th of April, to write to his nephew, Mr. Reynolds, desiring him to come to Paris. On the 17th, the deceased attempted to write to Mr. Thrupp, to request him to bring his will to Paris, and to countermand the coming of Mr. Reynolds. This letter (attempted to be written by the deceased) was almost illegible, and showed some symptoms of wandering and incoherence, and was not forwarded, but Colonel Jones, a gentleman residing at the hotel where the deceased was, wrote a letter to the effect attempted by the testator, and sent it to Mr. Thrupp, but it did

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not arrive in time to prevent Mr. Reynolds going to Paris, where he arrived on the evening of the 18th, accompanied by his wife, the niece of the deceased, both of whom were received by him with the greatest kindness and affection. On the morning of the 20th, the deceased, becoming worse, Mr. Reynolds was induced, by the persuasion of the medical attendants (which he had at first declined), to mention the subject of his will to the deceased; much delicacy was evinced by Mr. Reynolds in this respect, as it was not until urged by the medical attendants that he consented to mention the subject. On his asking the deceased whether he had any alteration to make in his will, and offering to do it, the deceased declined, saying, that he (Mr. Reynolds) did not know the will, upon Mr. Reynolds, saying that that did not signify, as he could make a codicil, the deceased then desired that a sheet of paper should be procured, and the papers in question were then written. Sir Augustus West was present at this time, but left the room, and returned after the execution, and he says, the deceased was perfectly capable of making a will. That the deceased was capable of making a *simple* disposition of his property is sufficiently proved, but the question is, was his capacity adequate to the due execution of such a paper as is now propounded? With respect to his capacity in general, I am of opinion that it was sufficient to have done any simple independent act, not tending to affect the disposition contained in his will.

What was the history and character of the deceased? He was fifty-two or fifty-three years of age, and had passed a considerable portion of his life in India,

where, as he stated, by laborious exertions he had acquired a considerable fortune, estimated at about 4000*l.* in England, and 50,000*l.* in India, besides a small real estate in this country. He had separated from his wife, for whom he had provided by settlement. He had a brother and sister, for the latter of whom and her family, he entertained a sincere regard and affection, and with whom he lived on terms of intimacy and cordiality. Although some coolness had taken place between the deceased and Mr. Reynolds, Junr. and his wife, yet that had been entirely removed before December, 1835, when he confirmed his will. There is no evidence from which it can be collected, that the deceased intended to alter the disposition contained in his will, before he quitted England in March, 1836; but it was not improbable that he might intend to give a larger benefit to Mr. Reynolds and his family, and looking to the evidence, had the deceased clearly and unambiguously expressed his intention of making a larger provision for them, the capacity of the deceased was sufficient to enable the Court to pronounce for such an instrument. But the real question is, upon the face of the papers themselves, was the deceased fully aware of the contents of these instruments? And did he intend to alter the disposition contained in his will, considering the care and caution with which it was framed, and has he expressed himself so as to leave no doubt of what he intended?

The first paper sets forth, that at the death of his wife, 4,800*l.* a-year (which was not correct, and which was afterwards struck out) would revert to him, and it went on, "I left Jane Bearcroft, 100*l.*

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for life, now the interest"—and there it broke off, so that this is an unfinished paper and contains nothing of a testamentary disposition, and does not, on the face of it, show strong marks of capacity.

The next paper, the most important paper, is as follows :—" I make this codicil to my will ; Ann and you must sink every thing for your own use." Now what is the meaning of these words ? *Prima facie* they dispose of the whole of the property ; but it is not contended that such was the intention of the deceased, but merely that the residue given to the East India Company should be bequeathed, and it is clear that the testator intended to give something short of the whole property to " Ann" and her husband, but what particular parts were to be excepted, it is extremely difficult to conjecture. It was said, that if the papers were all proved together, a Court of Construction would not hold that the entire property was disposed of by this paper, and that this Court had only to say whether the deceased was of sufficient testamentary capacity, and intended the paper to operate, and that it had no right to consider what might be the construction of the instrument ; and if this were a finished and perfect paper, I agree to that position ; but is this a finished and complete paper ? Looking at the paper, is it such a one as to need no extrinsic evidence to support it ? The paper is incomplete and unfinished, it has no date nor signature, and the name of the testator does not appear in it ; and the Court, before it pronounces for such an instrument, must be satisfied that by so doing it would be carrying into effect the real intentions of the deceased. On the face of this paper it does not appear that

the deceased clearly understood what his own meaning was; if he did so, why did he not make it more intelligible? But when asked by Mr. Reynolds, who did not understand him, for an explanation, he extended his arms and said, "You are my executor, take it all—all amongst you." Yet the evidence of Sir Robert Chermside, shews that the deceased intended the legacies to Mrs. Johnson and Miss Bearcroft to stand, but Sir Robert understood the deceased to mean that all the rest was to go to Mr. and Mrs. Reynolds. If the deceased's capacity was so perfectly clear and unclouded as this witness represents, how was it that he did not fully explain what he meant by "sink all amongst yourselves?" Nothing could have been more easy than to say, "I mean you to have the residue which I have bequeathed by the will to the East India Company;" and had the deceased explained himself to that effect in clear terms, the Court would have held that he had sufficient capacity. But looking at all the circumstances, there is not sufficient evidence to satisfy me that this paper contains the real wishes of the deceased, and that I should not, by pronouncing for it, defeat his intentions; I must, therefore, pronounce against the validity of No. 2.

The paper, No. 3, contains the bequest of 100*l.* to his servant, George Chenery. If this paper stood alone, the Court would have no difficulty in pronouncing for it, it having no bearing upon the disposition contained in the will, and being expressed in terms which exclude all uncertainty. Having, however, no doubt that the deceased intended this legacy for his servant, and being satisfied that he

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had capacity sufficient for such an act, and the intentions of the deceased being clear upon the face of this instrument, I shall pronounce for its validity. There may be an apparent inconsistency in the Court deciding for the sufficiency of capacity of the deceased for one paper, and for his insufficiency as to the other, both being drawn up at the same time. If the expressions in No. 2 had been equally clear with those in No. 3, the Court would have found no difficulty in decreeing probate of that paper also, but the terms in which these instruments are drawn up, form the grounds upon which the Court has come to this determination.

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A. and B.
having ap-
pointed C., their
attorney, for the
purpose of
taking admi-
nistration with
the will an-
nexed of D.,
for their use and
benefit, and C.,

*MURRAY and MALING against M'INERHENY
and IMPEY.*

This was an application to the Court to permit an administration bond to be delivered out of the registry for the purpose of being put in suit at law against the sureties, under the following circumstances.

James Murray, the deceased in the cause, died on the 12th of March, 1804. By his will he left the whole of his property (except his watch, uniform

having taken out such administration, and entered into the usual bond with two sureties. The Court refused to permit the bond to be attended with for the purpose of being put in suit against the sureties by A. and B., they never having called for an inventory and account from C., and having given him three years to pay the balance which was due to them under the administration, and he having in the meantime died insolvent.

and clothes) to his two children, Richard Rackett Murray, and Harriet Augusta Maling, widow, then minors; no executor was appointed by the will. In March, 1806, administration, with the will annexed, was granted to Charlotte Dick, (wife of Wm. Dick, Esq.) as the guardian of the children, for their use and benefit; this administration expired in 1816, upon Mrs. Maling attaining her majority. In 1830, administration *de bonis non* was granted to Humphrey Donaldson, as the attorney, and for the sole use and benefit of Mrs. Maling and Mr. Murray, they being in India; the usual bond was then executed by Mr. Donaldson, and M'Inerheny and Impey, his sureties, (the parties now proceeded against.) In 1833, upon Mrs. Maling and Mr. Murray's arrival in this country, they applied to Donaldson to account, and to deliver over the balance of the deceased's effects (800*l.*) to them; in answer to this application, Donaldson stated, by letter, his inability to pay over the balance at that time, but that he expected to be able to do so at the expiration of three years, from the profits of an office to which he had been appointed in Western Australia; in answer to this, Mr. Murray, on the 16th of May, 1833, wrote a letter to Donaldson, wherein he consented to waive any demand against him, at that time, for the balance, and to await the expiration of the three years, "in the hope that the money (the balance in question) would then be forthcoming."

Donaldson left this country on the 16th of December, 1833, and died insolvent in May, 1835. No administration had been taken out to his effects.

In Michaelmas Term, 1836, a decree at the suit

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of Mr. Murray and Mrs. Maling, was served on M'Inerheny and Impey, alleging that Donaldson had possessed himself of 800*l.*, that he had died insolvent, that he had not exhibited an inventory or rendered an account, and calling on them to show cause why the bond should not be produced in any action at law, &c.

In the course of the proceedings Mr. M'Inerheny died.

The *Queen's Advocate* and *Phillimore*, for Mr. Impey, resisted the application on three grounds :

First.—That Donaldson being the attorney of the parties now proceeding, it was not competent to them to sue his sureties ; that, although they might be liable to the Archbishop, yet, with regard to the parties before the Court, the act of their attorney was their own act, by the power of attorney they bound themselves to ratify and confirm what their attorney did ; that there was no instance in which, under similar circumstances, the sureties had been proceeded against.

Second.—That the parties having given Donaldson (the principal) three years to pay the money in, without the knowledge of the sureties, amounted in law to a discharge of their liability ; and they cited the following cases :—

As to the time ; *Nisbet v. Smith* (a), *Skip v. Huey* (b), *Rees v. Berrington* (c), *Law v. E. I. Company* (d), *Samuell v. Howarth* (e).

(a) 2 Brown, C. C. 579.

(c) 2 Ves. Junr. 540.

(b) 3 Atkyns, 91.

(d) 4 Ves. 824.

(e) 3 Merivale, 272.

That compounding with an acceptor discharges the indorser of a bill; Ex parte Smith (*f*).

That composition with the principal discharges the surety; Ex parte Gifford (*g*), Boulton v. Stubbs (*h*).

Third.—That there had been no breach of the bond; no inventory having been called for, and no decree made by the Judge.

Lushington, contra.—The point is, whether there has been a breach of the bond; the party having applied 800*l.* to his own use, had clearly committed a breach of the condition, “well and duly to administer” the deceased’s effects (*i*); a breach was also committed in not having exhibited an inventory or rendered an account within the time limited by the bond (*k*).

With regard to the administrator acting by power of attorney, there can be no semblance of reason in suggesting that the sureties are on that account released from responsibility.

And on the other point, as to time being given to Donaldson, the cases referred to do not apply, unless where a sum of money was due at a particular time; but in this case the responsibility was a continuing one, and subsisted until the whole duty was performed.

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The essential obligation of the bond is to exhibit

(*f*) 3 Brown, C. C. 1. (*g*) 6 Ves. 805. (*h*) 18 Ves. 20.

(*i*) Archbishop of Canterbury *against* Robertson, 1 Crom. & Mee. 690; 3 Tyrwh. 390.

(*k*) Williams’s Exors., 365, and the cases there referred to.

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an account of payments and receipts ; until this is done, there is no *constat* of any residue to be disposed of : but in this case, Donaldson, the administrator, had never been called upon to exhibit his account ; on the contrary, Mr. Murray, for himself and *prima facie* for his sister, had not only not taken any steps in order to obtain an account, but had given the administrator a term of three years before the money was to be called for. Under these circumstances, the parties interested having shown such a degree of acquiescence in the non-payment of the money, it would be inequitable at this time to call upon the surety.

Application rejected.

WALCOTT *against* OCHTERLONY, Baronet, by his
Guardian.

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The deceased having made a will, which she deposited with one of the executors, caused a letter to be written, desiring that the will

might be destroyed. The executor did not destroy the will, and the deceased was not informed, down to the time of her death, whether the will had been destroyed or not ; but died without having altered her intention to revoke, and in the belief that she had done so.

Held to be a revocation.

The question in this case was, whether the will of Charlotte Ann Montgomerie Ochterlony, late of the City of Edinburgh, spinster, deceased, was revoked or not ? The suit was brought by Captain John Edward Walcott, one of the executors named in the will, against Sir Charles Metcalf Ochterlony, Baronet, the brother, and only next of kin of the deceased, a minor, acting by his guardian.

The allegation on behalf of Sir Charles Metcalf Ochterlony, setting up the revocation of the will, pleaded in substance as follows :—

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First.—The death of the party on the 19th of June, 1835, leaving Sir Charles Metcalf Ochterlony, her brother and only next of kin, and that her property amounted to between two and three thousand pounds.

Second.—Her arrival from India, and her residence with Captain and Mrs. Walcott, and also with the family of Mr. George, until she went to Scotland in May, 1834, to the house of John Ross, Esq., at Cupar Angus, and in November in the same year, her going to lodge at the house of a Mrs. Bogle, with whom she thereby first became acquainted.

Third.—That about the 30th of April, 1834, she wrote out her own will, and executed the same in the presence of witnesses, and thereof appointed James George, Esq., John Edward Walcott, Esq., and John Ross, Esq., executors ; also, that she wrote so the said John Edward Walcott, earnestly entreating him to accept the office of executor, and also stating that she had deposited her will with the said James George, but adds, “ I have a copy, so I can alter it at any time, and the last made would, of course, be the one acted on, if properly signed and sealed.”

Fourth.—Exhibited the letter.

Fifth.—That in April and May, 1835, the deceased was suffering under a disease of the heart, and that her medical attendants forbade her writing. That during such time, she frequently spoke to Mrs. Bogle about her will, and expressed to her

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her intention to have it destroyed, stating, "it was now of no use," that in pursuance of such intention she directed Mrs. Bogle to write a letter to Charlotte Ann Walcott, the wife of Captain Walcott, to request that she would write to Mr. George, and request him to destroy the will; that Mrs. Bogle accordingly, on the 2nd of May, 1835, wrote to the said Charlotte Ann Walcott, a letter, in which were the following, among other words, "your niece desires her affectionate love to you and her uncle, and wishes you to write to her friend Mr. George, and request him to destroy a will of hers that she committed to his keeping, she says that it has been much in her thoughts for sometime, and wishes it might be destroyed without delay." That upon the said letter being read by Mrs. Bogle to the deceased, she approved thereof, and it was by her direction addressed, and sent to Mrs. Walcott on the fourth, and received by her on the sixth of the said month, &c.

Sixth.—Exhibited the letter.

Seventh.—That at the time of, or immediately subsequent to the writing of the aforesaid letter, the said deceased delivered to the said Mrs. Bogle a sealed packet, containing, as she then informed her, a copy of the aforesaid will in the possession of Mr. George, and made Mrs. Bogle solemnly promise to put it in the fire without perusing it, the moment she heard of the destruction of the original.

Eighth.—That on the 6th of May, immediately after the receipt of the letter by Charlotte Anne Walcott, Captain Walcott wrote to Mr. George, informing him of the wishes of the deceased, as contained in the letter of Mrs. Bogle; that in reply,

Mr. George wrote a letter to Captain Walcott, wherein, among other things, he wrote, "would you or myself venture to destroy a will made by a person in perfect health of body and mind, by the desire of a third party, when the maker is in such a reduced state as to be scarcely sensible of what her wishes are? I enclose it to you, my dear sir, as her nearest connexion, and shall be perfectly satisfied with your destroying it, or by your forwarding it to Charlotte, which I think will be the most regular and safe way;" that in a postscript to the said letter, he added, "I find the will is too heavy for a frank, I will get an office frank, or forward it per coach to-morrow;" but that he did not forward it until the 14th of the said month.

Ninth.—Exhibited the letter.

Tenth.—That though intelligence of the destruction of the said will could not reach the deceased for several days after sending the said letter of the 2nd of May, her anxiety to have the said will destroyed, increased; and in further pursuance of such her wishes and intention, that the said will should be forthwith destroyed, she directed Mrs. Bogle to write to Mr. George himself; that she accordingly, on the 8th of May, wrote to him a letter, containing, amongst other things, the following words: "In my last letter to Mrs. Walcott, I was desired by my young invalid to tell her to write, and request you to destroy a will that she committed to your care, the copy of which she possesses, she meant to give you her reasons whenever she can write. She tells me that it annoyed her very much during her serious illness, because there is much in it, she says, that is now of no use."

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That upon the said letter being read by the said Mrs. Bogle to the deceased, she approved thereof, and it was by her direction forwarded and sent to Mr. George; that he duly received it on the 13th of May, and on the following day endorsed on the envelope of the will of the deceased, the following words: "this will to be destroyed, as per Mrs. Bogle's letter to Captain Walcott and J. George," date, 8th May, J. George, London, 14th of May, 1835.

Eleventh.—Exhibited the letter.

Twelfth.—That on the 13th of May, 1835, Mr. George wrote a letter to Mrs. Bogle, and amongst other things, expressed himself as follows: Tell dear Charlotte, her instructions respecting her will shall be attended to, but she had only to write these few words, 'I hereby revoke all wills made to this date,' which would have been sufficient. It is quite unnecessary for the dear girl to give any reasons for destroying the document; that George sent the letter by a private bearer, and the same was *not received* by Mrs. Bogle until the 10th of August, after the death of the deceased.

Thirteenth.—Exhibited the letter.

Fourteenth.—That on the 14th of May, Mr. George transmitted the will, by parcel, to Captain Walcott, at Bath, who duly received the same, and that on the 10th of June following, he forwarded the same in a letter, addressed to the deceased, in which letter he wrote as follows: "I never think it satisfactory to employ other hands than one's own in the destruction of papers of importance. On Mr. George, therefore, forwarding me your will, I determined to wait an opportunity of transmitting

it to you which has just offered through the hands of Miss Blackmore, on her way from Bath to Edinburgh."

. *Fifteenth.*—Exhibited the letter.

Sixteenth.—That Mr. George, in a letter dated the 14th of May, addressed to Mrs. Bogle, apprised her of the writing and sending the letter of the 13th of May before mentioned, which information was made known to the deceased. That she, in consequence of not hearing from Captain Walcott or receiving the letter of the 13th of May, declared to Mrs. Bogle that she would have again pressed the subject upon their attention, but that she expected that the letter written by Mr. George, dated the 13th of May, would announce either the destruction of the will or contain the will itself, for the purpose of enabling the deceased herself to destroy it. That shortly prior to her death, the deceased expressed a wish and intention of making a new will revocatory of the will pleaded in this cause, but was dissuaded therefrom by the said Mrs. Bogle, who informed her that as the will would be destroyed, it was unnecessary for her to make another, and that her brother, the said Sir Charles Metcalf Ochterlony, would be her heir without a will, and that the deceased assented to and acted upon such representations of the said Mrs. Bogle.

Seventeenth.—Exhibited the letter.

Eighteenth.—That on or before the seventh day of June, 1835, Sir Charles Metcalf Ochterlony went to visit his sister, the deceased, at her lodgings in Edinburgh, and remained with her until the ninth of the month, being the day of her decease. That during such time no communication was made

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either by the deceased or Mrs. Bogle to him, respecting the deceased's property, or her said will, or her desire for the revocation thereof.

Nineteenth.—That the disease of which the deceased died, was an affection of the heart, and her death was very sudden. That in order to avoid her being agitated, her medical attendants advised her to abstain from writing or reading, or attending to business. That during the premises, the deceased was of sound mind, &c.

Twentieth.—Was the usual concluding article.

This allegation was opposed, and it was contended, in opposition to it, by the *The Queen's Advocate* and *Nicholl*, that if all the facts were proved, the will in question was not revoked, that the declarations of the deceased did not amount to more than an intention to revoke at a *future time*, which even before the Statute of Frauds would not have been a good revocation. (a) But the twenty-second section of the Statute of Frauds (29 Car. 2, c. 3), it is submitted is decisive of the point; it enacts, "that no will in writing, &c., shall be repealed by any words, or will by word of mouth only, &c." There is no *act* done in this case by the deceased, is it not an attempt to repeal by words?

Lushington and *Haggard*, *contra*.

COURT.

At present I am not prepared to say, that under the circumstances stated in this allegation, a revocation could not be effected; on the other hand, without seeing the evidence, I cannot say

(a) *Cranvell v. Sanders*, Cro. Jac. 497.

what may be the result. I shall admit the allegation, without giving any opinion as to the result.

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Witnesses were afterwards examined, and the cause was argued on the 19th of July, 1837.

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Charlotte Anne Montgomerie Ochterlony, the deceased in this case, died at Edinburgh, on the 9th of June, 1835, of the age of twenty-three years, leaving an only brother, Sir Charles Metcalf Ochterlony, Baronet, her only next of kin. On the 30th of April, 1834, the deceased, when in London, with her own hand made her will, of which she appointed James George, John Edward Wallcott, and John Ross executors. This will was deposited with Mr. George for safe custody.; and the question is, whether, under the circumstances of this case, that will is revoked? In November, 1834, the deceased went to lodge at the house of a Mrs. Bogle, in Edinburgh, where she continued until her death. In April, 1835, it appears that she was attacked with a disease of the heart, of which she ultimately died; and her medical attendants directed that she should not be suffered to write or read, or attend to business, in order that she might not be agitated.

In the beginning of May, 1835, Mrs. Bogle, by the deceased's desire, wrote to Captain Walcott's wife at Bath requesting her to get her husband to write to Mr. George, directing him to destroy the deceased's will. Captain Walcott accordingly wrote to Mr. George, but he declined to destroy the will, but sent it to Captain Walcott that he might, if he

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thought proper, destroy it or forward it to Miss Ochterlony. Captain Walcott, it appears, on the 10th of June, enclosed the will in a letter to the deceased, which he forwarded by a lady who was going from Bath to Edinburgh, but the deceased died before the will arrived. It appears that up to the time of her death, the deceased expressed her anxiety that the will should be destroyed, and stated to Mrs. Bogle that she would make a new will in order to revoke the former, but that Mrs. Bogle dissuaded her from so doing, informing her that as the will would be destroyed it was unnecessary to make a new one.

It is proved by Mrs. Bogle, that the letters were written by the deceased's direction, and that the passages relating to the destruction of the will were read over to and approved of by her. Now, although looking at the contents of the will, there was no reason to suppose that the deceased would depart from it; yet improbability must give way to facts, and there is no ground to suspect that Mrs. Bogle, who was ignorant of the contents of the will, had any interest or bias in respect to it.

The first, question, therefore, on the facts she deposed to is, what was the intention of the deceased? There could be no doubt of her *animus revocandi*, and having established this point, what does the law require to give effect to such intention?

The Statute of Frauds provides that no will in writing of personal estate shall be repealed, nor any clause or bequest therein altered or changed by *any words*, is this a revocation by words? I apprehend not; the deceased did not say, "I revoke

my will," but in effect says, "Mr. George is in possession of my will; I am not able to destroy it myself, but I desire that he will destroy it;" and this amounted to a present intention absolutely to revoke, which was written down at the time, approved of by the deceased, and by her direction communicated to the person in whose custody the will was; it was *an absolute direction to revoke, reduced into writing in the deceased's lifetime*. There is nothing in the Statute of Frauds which prevents such revocation having effect, and it is clear that, prior to that statute, a will might be so revoked. Further, the deceased subsequently directed a letter to be written to Mr. George, intimating that she would give her reasons thereafter, and evinced anxiety for a reply to that letter down to the time of her death; there can be no doubt that she died in the intention to revoke the will, and in the belief that it was revoked.

I am of opinion, that the will in this case is revoked, and that the deceased is dead intestate. (a)

(a) See Doe dem. Reed *against* Harris, 8 Ad. & Ell. p. 1, S. C. 4 N. & P., which was a question as to the revocation of a will as to copyhold estate. The same case as "Harris *against* Reed, was depending in this Court, but was ultimately compromised.

1837.

July 19th.

WALCOTT
against
OCHTERLONY.

In the Goods of SARAH SOPHIA SOAMES MONDAY,
deceased.

1837.

HILARY TERM.
1st Session.
January 14th.

Administration
with will an-
nexed, as exe-
cuted in pur-
suance of a
power refused,
the power not
being before the
Court.

The deceased died a widow on the 11th of March, 1836, having during coverture with Joseph Monday, her late husband, duly executed, as alleged, her last will and testament, in pursuance of a power under her marriage settlement. By the said will, Joseph Monday was appointed sole executor, and the whole of the separate property was bequeathed to him, with the exception of a small legacy. He died in the lifetime of the deceased.

The King's Advocate.—Upon affidavits, stating that the deceased died without any known relation, and that the usual advertisements had been made, prayed administration with the will annexed to be granted to George Maule, Esq., the nominee of the Crown; but there being no proof that the will was executed agreeably to the power; neither the settlement nor a copy of it being before the Court, the motion was rejected.

In the Goods of JEAN EUGENE LAMONTAGNE
BOURGET, *deceased*.

The deceased in this case, a native of Nantes in France, and lately a planter in the island of Mauritius, died on the 23rd of February, 1835, in London, a bachelor, leaving his mother and two sisters his next of kin. The deceased having become insane, his property (about 4000*l*.) by the advice of Mr. Capper, of the Alien Office, was placed in the hands of Messrs. Rothschild for safe custody. After the deceased's death a will in very incoherent terms was found about his person, addressed to the Lord Mayor.

1837.

HILARY TERM.
1st Session.
January 14th.

A party having died insane, leaving a will, which upon the face of it exhibited marks of insanity, the Court granted administration of the effects of the deceased as dead intestate, but directed the will to be deposited in the registry.

Addams, upon affidavits to the above effect, prayed administration to be granted to the mother as in intestacy.

The Court having no doubt from the affidavits, and upon the face of the paper itself, that the deceased was insane, granted the motion, but directed the paper to be left in the registry, in order that any one having an interest might propound it, if he should think fit so to do.

acted on by judge of City Probate Jan 1837?
30 Jan 7. 310

In the Goods of THOMAS WILLIAM BARKER,
deceased.

1837.

HILARY TERM.
1st Session.
January 14th.

Where a party has the right to the administration under the statute, he must be cited or consent, before the Court will grant administration to a third party.

The deceased died intestate, a bachelor, leaving his lawful father him surviving, who had not taken out letters of administration to the deceased's effects.

Lushington moved the Court to grant administration to a third party, limited only to property in which the father of the deceased had no interest; the father had not been cited.

COURT.

The father is entitled by statute to the administration, although he may have no interest in the property, limited to which this administration is prayed. Whenever a party has a right to the administration, the Court always requires that he should be cited, or consent.

Motion rejected.

fr 275. in fine

In the Goods of FRANCIS CARY, *deceased.*

1837.

HILARY TERM.
3rd Session,
January 31st

No person being able to make the usual affidavit as to the handwriting of the deceased: the same having been compared with signatures of the deceased, and all parties interested consenting, the Court dispensed with such affidavit.

Francis Cary died on the 5th of December, 1836, a bachelor, leaving two nephews and a niece, his only next of kin, the only persons entitled in distribution in case he had died intestate.

He left a will and three codicils, all in his handwriting, of which he appointed his niece, Mary Ann

writing, of which he appointed his niece, Mary Ann

Carey, and his nephew, George Carey, executors. Neither the will nor codicils were executed in the presence of witnesses, and no parties could be found who could make the usual affidavit as to the deceased's handwriting.

1837.

HILARY TERM.
3rd Session
January 31st.

IN THE
GOODS OF
FRANCIS
CAREY,
deceased.

Haggard.—Upon the affidavit of Mr. Charles Pain, a solicitor, who had compared the signatures of the deceased to the papers before the Court, with his signature to a deed of assignment (made in 1826, in Mr. Pain's presence, and which was the only occasion on which he had seen the deceased write), and which he deposed as to his belief of their being made by the same person; and upon the affidavit of Mr. Goldney, a stockbroker, who had compared the signatures in question with those of the deceased in the dividend book at the Bank of England, and upon the consent of all parties interested, moved the Court to grant probate, which was granted accordingly.

MAYHEW and Others against NEWSTEAD.

In the Goods of MARY NEWSTEAD, Widow, *deceased.*

Mary Newstead, widow, died in the year, 1831, having made her last will and testament in writing, bearing date the 31st of July, 1822, and therein appointed her son, Joseph Newstead, sole executor and universal legatee. The son having become embarrassed in his circumstances, on the 3rd of October,

1837.

HILARY TERM.
2nd Session.
January 24th.

The executor
and universal
legatee under a
will, having as-
signed his in-

terest to trustees for the benefit of his creditors, administration with will annexed granted to two of the trustees, he having been first cited.

1837.

HILARY TERM.
2nd Session.
January 24th.

MAYHEW
and
OTHERS
against
NEWSTEAD.

1835, executed an assignment of all his property to four trustees for the benefit of his creditors. On the 2nd of January, 1837, a decree issued, at the suit of the trustees, citing the son to appear, and accept or refuse probate of the will of the deceased, or shew cause why letters of administration with the will annexed should not be granted to them, or one of them; this decree was personally served, and no appearance being given.

Addams moved the Court to grant the administration to the trustees.

Administration with the will annexed, granted to two of the trustees.

In the Goods of GEORGE WATTS, *deceased*.

1837.

HILARY TERM.
4th Session.
Feb. 8th

A party deceased, having made a will, who was afterwards found to be of unsound mind from a date anterior to that of the will; the Court refused upon affidavit and consent of parties, on motion, to decree such party to be dead intestate, there being nothing on the face of the will sounding to folly.

The deceased in this case, in June, 1827, executed a will and codicil, which were attested by three witnesses; a few months afterwards, under an inquisition of lunacy, he was found to be of unsound mind, and to have been in the same state from the month of April, 1826, a time preceding the date of the will and codicil. Upon an affidavit of these circumstances, and on the consent of all parties interested, except a few legatees under the will in trifling sums,

Nicholl prayed administration of the effects of the deceased as dead intestate to be granted to the widow.

SIR HERBERT JENNER.

The will in this case is regularly drawn and executed, and is apparently as sane a will as can possibly

be, it is a perfect instrument, and there is nothing on the face of it sounding to folly. How can the Court then, on mere *ex parte* affidavits, pronounce against such a paper? The consent of parties interested proves nothing; no person's consent can make a will no will. If such a proceeding were countenanced by the Court, it might open a door to fraud. This Court is not precluded from an investigation of the circumstances of the case by the mere verdict of a jury. The deceased might have had lucid intervals, and the will and codicil, as in *Cartwright v. Cartwright*, (a), may have been executed in one of such intervals, for they both, on the face of them, bear marks of sanity.

The Court cannot entertain a question of this kind in the present shape.

Motion rejected.

1837.

HILARY TERM.
4th Session.
Feb. 8th.

IN THE
GOODS OF
GEORGE
WATTS
deceased.

In the Goods of HENRY HUTTON, deceased.

Henry Hutton, the master of the merchant ship Forth, a bachelor, sailed from the Port of London in the month of November, 1834, on a voyage to Manilla, where he arrived on or about the 20th of May, 1835. In the month of July, 1835, he re-embarked on board the said ship from Manilla on his return to London, where the ship was expected to have arrived in about four months afterwards, but neither the ship nor any person on board have since been heard of. The ship and cargo were in-

1837.

HILARY TERM.
BYR-DAY.
Feb. 16th

A person having sailed on board a vessel at Manilla in July 1835, on a voyage to London, and the vessel never having been since heard of, nor any one on board, presumed to be dead.

(a) 1 Phill. 90.

1837.
 HILARY TERM.
 BYE-DAY.
 Feb. 16th.

IN THE
 GOODS OF
 HENRY
 HUTTON,
deceased.

sured, and the underwriters had paid as upon a total loss. The party had made no will.

Phillimore, under these circumstances, submitted that the party must be presumed to be dead, and he prayed administration of his effects to be granted to his mother as next of kin.

The Court granted the administration.

In the Goods of ROBERT MURRAY, *deceased.*

1837.
 EASTER TERM.
 1st Session.
 April 20th.

A husband, his wife, and child having perished together, administration granted of the husband's effects as dead, a widower.

Robert Murray, together with his wife and only child proceeded on a voyage from Dublin to Quebeck, on board the barque *Emerald*, of London, in the month of October last; on the 25th of the said month, during a severe gale, at eleven o'clock at night, the vessel struck the land.

At the time when the vessel struck the land, Murray was on deck, his wife and child being below in the cabin, Murray afterwards went below, and shortly after the vessel again struck the land and went to pieces, and the deceased, his wife, and child were drowned.

The above circumstances were set forth in an affidavit by the late mate, who survived. The deceased left a will, in which he had bequeathed the whole of his property to his wife.

The COURT, on the motion of *Burnaby*, granted administration with the will annexed to the next of kin of the husband as dead, a widower; there being nothing to show that the wife survived, the next of kin of the wife consenting.

CONSISTORY COURT OF LONDON.

The Office of the Judge promoted by
WILLIAMS *against* HALL.

THIS was a criminal proceeding, instituted by the Vicar of Hendon, the Reverend Theodore Williams, against James Hall, a parishioner, for quarrelling, chiding, and brawling by words at a vestry meeting of that parish, held in the vestry-room, situate in the church-yard, and adjoining to and communicating with the parish church.

The Articles, which were admitted on the Second Session of Michaelmas Term, 1836, pleaded the law, and that, on the 23rd of June, 1836, at a vestry meeting, &c., the said James Hall, in the course of some conversation arising out of the business for which the meeting had been convened, in a brawling, chiding, and quarrelsome manner, and in a loud tone of voice, and addressing himself to the said Reverend Theodore Williams, though cautioned by him to abstain from, and not to commit himself by the use of intemperate and improper language, said, "You are anything but a gentleman;" and shortly afterwards, "Your conduct is disgraceful to a clergyman;" and "You are a disgrace to your cloth;" to the great offence of the persons assembled.

A defensive allegation was given in by Mr. Hall,

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WILLIAMS
against
HALL
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WILLIAMS
against
FARLAR.

Articles for brawling, at a vestry held in the vestry-room within the church-yard, being proved, the Court suspended the defendant *ab ingressu ecclesie* for one week, but did not condemn him in the whole costs, in consequence of irritating expressions having been proved to have been used by the promoter.

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WILLIAMS
against
HALL
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against
PARLAR.

which pleaded that the vestry meeting was held pursuant to public notice, specifying the hour of three precisely as the time of meeting; that, at three o'clock, some of the parishioners had assembled in the vestry-room, according to the notice, and waited till after four o'clock, when in consequence of the Reverend Mr. Williams not being in attendance, James Heward, a parishioner present, was elected chairman, and the meeting proceeded to business; the notice was read and certain resolutions were proposed and agreed to; that Mr. Williams, having in the meantime learned that the parishioners had so assembled, entered the vestry-room about half-past four o'clock; that upon his entrance he appeared, and in fact was, much excited and angry, and complained of the meeting having proceeded to business without him, insisting that they had no right to do so; and, looking at his watch, said it was only then twenty minutes past four, and that he threatened to bring an action against the said James Heward for taking the chair in his absence. The allegation went on to deny the charge contained in the Articles, and to plead that Mr. Hall, whilst making some remarks upon the business before the meeting, was, from time to time, although in order, interrupted by Mr. Williams, and also by other persons, whilst expressing his sentiments; and when he appealed to the chair for protection, &c., Mr. Williams, addressing him, among other things, said, "If you think you hold any place in my estimation, you are much mistaken;" whereupon Mr. Hall replied, that such was not fit language and conduct for a minister of peace; that he expected and had a right to be

treated as a gentleman, or expressed himself to that or the like effect; that Mr. Hall kept his temper and refrained from expressing himself in a chiding or brawling manner, and did not raise his voice more than was needful to state his sentiments upon the matters brought before the meeting; that the vestry-room is in dimensions about ten feet by nine, and was formerly a family vault; the persons assembled were about twelve in number, and were seated round a table, so that, from the size of the room and the situation of the persons therein, any expressions, which might have been used by Mr. Hall, if spoken in a loud tone of voice, as pleaded, must have been heard by all the persons present.

On the behalf of the Reverend Mr. Williams, an allegation, responsive to the foregoing, was given in, pleading that it has long been the practice in the parish of Hendon, not to commence business at vestry meetings until after the expiration of a full hour from the time at which such meetings are appointed to be held, and such practice is well known to and among the parishioners generally; that accordingly the attendance of the parish officers was not required until a full hour after that at which the meeting was formally appointed to be held; that, notwithstanding, the Reverend Mr. Williams was in the church or church-yard by three o'clock, and continued either in or close to the church-yard until a few minutes before four o'clock, awaiting the arrival of the parish officers or some or one of them, and a due attendance of parishioners, previous to taking the chair and commencing the business of the vestry; the only parishioners then in attendance being William

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Farlar, James Hall, and two or three others, neither of them officers of the parish ; that no other person being in sight at such time, Mr. Williams left the church-yard and walked a short distance down the road by which he expected their arrival, in order to meet and expedite any such of the officers or others of the parish as might be in progress to the vestry ; and having met and returned, accompanied by certain of such persons, entered the vestry-room by at latest about ten minutes past four o'clock ; that, upon so entering the vestry-room, finding James Heward in the chair, he said, but not in any tone of excitement or irritation, that he, as vicar of the parish, was entitled *ex officio* to the chair, which the said James Heward, who made no offer to quit the same, had no right to retain ; whereupon (and not before) Heward vacated the chair, which then was taken by Mr. Williams, and denied that he was angry, &c. as pleaded in Mr. Hall's allegation ; that Mr. Hall was not interrupted by the Reverend Mr. Williams, who did say to Mr. Hall, " If you think you hold any place in my estimation you are much mistaken," as pleaded, or something to that effect ; thereby meaning that he had too little value for the said James Hall to suffer himself to be put out or provoked by him, but that the Reverend Mr. Williams did not so say when appealed to (if appealed to) by Mr. Hall for protection, &c. as pleaded by him, but in reply to and by way of rebuke for the offensive conduct and language of Mr. Hall to him, as set forth in the Articles.

The admission of this allegation was debated on the 27th of May, 1837, when

The *King's Advocate*, for the party proceeded against, opposed its admission, objecting, in the first place, to the delay which had taken place on the part of the promoter, who had not commenced the suit till the first Session of Michaelmas Term, 1836; who had been assigned to give in his answers to the defensive allegation on the 7th of March, 1837, but they were not given till the 29th of April, four months after that allegation had been debated: Secondly, that this further plea was unnecessary, as it contained no new facts in support of the original charge.

Addams, in support of the allegation, was stopped by the Court.

DR. LUSHINGTON.

It is a calamity attending cases of this description, that the Court is under the necessity of going into minute circumstances, in order to do justice between the parties. Mr. Williams, who promotes the office of the judge, has brought a charge against a parishioner of chiding and brawling, and the party proceeded against brought in a defensive allegation, which not only contains a denial of the fact, but goes on to plead circumstances, whence gross misconduct is imputed to Mr. Williams himself. Then comes the third allegation, pleading certain averments in reply to the defensive allegation.

The first objection is as to the period of time when the allegation is offered, and as to the delay imputed to the promoter in giving in his answers. But if the answers were improperly delayed, the course was to apply to the Court, and the Court

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cannot, on this ground, be precluded from admitting the allegation. Looking to the whole of the allegation, I think that, in substance, it is clearly admissible; and though at the same time I feel the force of the other objection urged by the learned counsel for Mr. Hall, I am of opinion that I shall do no prejudice to him by admitting it. Although some of the facts pleaded are not strictly responsive, and all of them do not immediately bear on the question of chiding and brawling; yet they have a bearing on this question, whether Mr. Williams misconducted himself or not; and we all know in these Courts, that if a party, promoting such a suit, shall have been himself guilty of misconduct, he will stand in a different position with respect to the costs than if he had not misconducted himself. I must, therefore, admit the allegation.

Witnesses were examined on both sides, and the cause came on for argument and sentence this day.

Addams was heard on behalf of the promoter, and the *Queen's Advocate* for Mr. Hall.

The Court suspended its judgment till another case was heard, "*Williams against Farlar*," which was a similar proceeding, instituted by the same promoter, against William Farlar, another parishioner, for a similar offence on the same occasion, and which case had gone on *pari passu* with the other. In the latter case, the words imputed to the defendant were (with reference to the promoter), "You fancy yourself the sultan of Hendon, but I am come to teach you that we are not living in Barbary, and that you have not Turks to deal

with ;" " You have more impudence than even the Surrey parsons ;" " You are anything but a gentleman ;" " Your conduct is disgraceful to a clergyman ;" alleged to have been spoken in a chiding and brawling manner.

JUDGMENT.

Dr. LUSHINGTON.—Although there is a good deal of conflicting evidence on both sides, in this case, as to some points ; yet, in those of the greatest importance there is as much unity of testimony among the witnesses as could be expected under the circumstances of the case ; for where a vestry has been held, as this was, at a time of great excitement, and where there was much heat, perhaps, on both sides, it is hardly to be expected, and indeed it would be contrary to human experience, that the witnesses could be prepared to depose with minute accuracy to every particular transaction, or to the course of these transactions.

The jurisdiction of these Courts, in matters of this kind, is founded entirely upon the fact of the place of meeting being upon consecrated ground, and the authority is vested in these Courts for the purpose of protecting such consecrated place or ground from that desecration which the law considers would be the effect of allowing abusive language on either side to pass with impunity.

A great many preliminary circumstances have been insisted upon by the counsel for the promoter, which have also been commented upon by the counsel for the defence ; I allude, in particular to the intention of Mr. Farlar in taking a small field at the rent of eight pounds a-year as tenant at will,

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for the express purpose of attending these vestries ; and if I were disposed to press against him the evidence of Mr. Hall, I might be induced to come to that conclusion, as Mr. Hall states that he instigated him to take the land for the purpose of attending the vestry and assisting in the parish business. I am not, however, disposed to lay great weight upon this circumstance, because I apprehend my peculiar duty is, to see what actually did pass in the church ; and that I am not called upon, as a matter of necessity, to form any determination, or at least to express any opinion, either as to whether Mr. Farlar was so induced to take the land for that purpose, or what were the motives which instigated him in becoming a rated parishioner of Hendon ; and for this reason, also, I do not intend to enter with any minuteness into the proceedings of other gentlemen who were with him at this vestry on the 23rd of June, 1836. I should further observe, that nothing can be more unfortunate than the practice which has prevailed in this parish of very great irregularity in the time of holding vestries. It is proved, on the present occasion, that in the notice for the meeting, the time was stated to be "three o'clock precisely ;" yet it appears that the custom of the parish was, notwithstanding such a notice, not to meet till four o'clock, one hour afterwards, and sometimes, as it would appear, not even then with punctuality, but as the parishioners attended. Now such a practice might lead to great inconvenience, because persons, occupied in their various businesses, might come a quarter of an hour after, when most important business might have been despatched, in which such persons might have been interested. I

earnestly express my hope, after what has occurred on the present occasion, that greater regularity in this respect will be attended to at these meetings.

I now proceed to those parts of the case which it is necessary I should notice with great minuteness. But I will first state what I consider to be the rule which governs this Court in matters of this kind. I apprehend, if words, which amount to the offence of brawling, be distinctly proved, that the Court has no alternative but to pronounce the sentence of the law. But the Court has been in the habit, even where words of brawling have been distinctly established by evidence, of entering into a further consideration, to see how far such expressions have been excited by irritating expressions on the other side; and, under such circumstances, the Court has considered itself justified in making these matters form a part of its deliberation, and in diminishing the amount of the costs in which it condemns the party proceeded against, where great provocation has been given. It is right, however, that I should state that there are some expressions of brawling so very gross and heinous, that, if proved, whatever might be the provocation offered, the Court would not apply this principle; but would then be under the necessity of condemning the party in the whole of the costs, leaving that party, if he thought fit, to prosecute the other for the expressions used by him.

I am now, then, in the first instance, to consider whether brawling expressions have been used by Mr. Hall; and secondly, supposing the words are proved, whether there are any matters of mitigation which ought to govern the judgment of the Court on the question of costs. And here, I

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should state, that, according to all principles of evidence, in these Courts and in Courts of common law, and in accordance with reason and good sense, affirmative evidence, (unless it is shewn that the person is undeserving of credit) must always preponderate over negative evidence, for divers reasons. I wish it further to be observed that I enter not in any degree into the propriety of what was to be done at the vestry. Every person, who conducts himself with propriety, has a right to exercise his own judgment as to the part he takes at a vestry meeting.

It appears that these gentlemen arrived at the vestry-room at about three o'clock, whether in pursuance of the word "precisely" in the notice, or not, I think unimportant, and they remained there a considerable space of time. During that time, Mr. Williams, the vicar, came at least once to the church; so that there was no neglect or remissness on his part. The result of the evidence is, that these gentlemen waited till four o'clock before they proceeded to business, and, being cognizant of the usage of this parish, if they had done so before, there would have been too much appearance of snapping a vestry. As soon as the clock struck four, in the absence of the vestry-clerk, and of the parochial registers, as well as of the vicar, business is immediately proceeded with, and carried into effect with no small despatch, because it is in vain to say, only one resolution was passed; there were two very important resolutions, one postponing a church-rate till March, 1837; the other to take the books out of the custody in which they were, and to place them in the hands of Mr. Elford. This last resolution is admitted to

have been drawn up when Mr. Farlar was at Kensington. I think it of no importance whether Mr. Williams entered the room a quarter past four o'clock, or at twenty minutes past four, or at the half-hour. I see no reason to impute to him any negligence in the discharge of his duty : want of punctuality had been the order of the day for a long time, and he had been waiting for somebody else.

Mr. Williams, upon entering, was, I presume, a little surprised at finding business had commenced, because it was a little extraordinary, and I apprehend it to be unusual in any parish to commence business without the clerk of the vestry, or some person experienced in such matters, to take down the proceedings, and without the parish officers. Whether Mr. Williams, upon finding Mr. Heward in the chair, threatened him with an action, has been a matter of discussion. I do not think the evidence is satisfactory on this point ; but if I were under the necessity of coming to a conclusion, I am inclined to say, that Mr. Williams, in all probability, may have used some such expressions as those imputed to him, and, under all the circumstances of the case, I am not much surprised at it, or that Mr. Williams should have felt some affront at the manner in which the business had been carried on.

Now I must keep these two cases distinct, and not introduce anything that comes out of the proceedings against Mr. Hall as against Mr. Farlar, and *vice versa*. Now then for the charge against Mr. Hall.

I entertain not a doubt, and I do not think that the contrary has been seriously contended, that the words charged are words of brawling : because, if they are not, I should be utterly at a loss to under-

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stand what words do constitute brawling. To say "You are any thing but a gentleman; your conduct is disgraceful to a clergyman;" and "You are a disgrace to your cloth;" are words which, in my opinion, if proved, completely bring this case within the limits of the law.

Six persons have been examined, in support of this charge, to whom Her Majesty's Advocate did not impute perjury; but it is said that they may have been tutored by certain proceedings on the part of Mr. Williams, to which I must presently advert. The evidence of the first witness (for it is not necessary to travel through the whole) is, that Mr. Hall, finding the majority opposed to his views, said, addressing himself to Mr. Williams, with great warmth, and in a tone louder considerably than his ordinary mode of speaking, which is very low, "Your conduct is disgraceful to a clergyman; you are anything but a gentleman;" or "You are a disgrace to your cloth." Now my construction of this evidence is, that it speaks positively to this expression, "Your conduct is disgraceful to a clergyman." With regard to the other, the witness entertains a doubt whether it was, "You are anything but a gentleman," or "You are a disgrace to your cloth;" but it is of no importance, for one is of the same tendency as the other.

I need not go through the testimony of other witnesses; there are some slight variations, but supposing they are to be believed, it is impossible to say that the offence of brawling is not established against Mr. Hall.

It has been strongly pressed, on behalf of Mr. Hall, that these witnesses, previous to their examination, had had interviews with Mr. Williams; that

papers had been put into their hands, and that their evidence is in conformity to those papers rather than to their recollection. I regret to say that I think it was not right or fitting that these proceedings should have taken place with the witnesses. I make allowance for the difficulty of procuring evidence under the circumstances ; but if it is necessary that witnesses should be examined in this manner previously, it is more safely done by the proctor in the cause, one over whom the Court has a control, than by the individual promoting the suit : and therefore I cannot but express considerable regret that these witnesses should have had their memories refreshed in the way Mr. Williams thought proper to have recourse to. But I cannot for that reason travel to the conclusion that they deposed entirely according to the tenor of the papers put into their hands. (a) I see no reason to suppose so at all, and, looking at the means there are of disproving their evidence, if they had spoken falsely, I think this evidence, for the most part, is honest evidence, although there may be expressions which I should have desired to see spared.—And how is it encountered ? Simply by the evidence of persons who say they did not hear the expressions ; nor is it probable that any one witness would have heard the whole, nor is it likely that one witness would recollect the whole. Upon the principle I have already stated, where there is affirmative evidence, I am bound to take that in preference to negative evidence, and in doing

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(a) Some of the witnesses, on the part of the promoter, admitted, on interrogatory, that they had been shewn memoranda made by the promoter, of the words used by Mr. Hall and Mr. Farlar at the meeting.

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so, I do not mean to impute to those who have sworn that they do not believe the expressions were used, a wilful departure from the truth. I might easily point out reasons for the discrepancy of evidence. It is not to be expected that different witnesses should speak to the same facts; and hardly two of them give the same account of the transaction; and I never would believe witnesses who did depose, under such circumstances, to the same facts in exactly the same manner.

I am under the necessity, therefore, of saying, that I am of opinion that the charge against Mr. Hall is proved, and then I come to this question; whether there be any extenuating circumstances, which ought to induce me to withhold the necessary sentence of the law? namely, the condemnation of Mr. Hall in the whole of the costs. I greatly regret that the proceedings should have gone to the length they have; at the same time, I do not think any peculiar blame is attributable to either party; because, if Mr. Hall believed he had not made use of the expressions, it was natural that he should wish to defend himself, and he had a right to plead for that purpose, anything which might have been said by Mr. Williams in the way of provocation.

Now the only expression which is relied upon, as extenuating Mr. Hall's offence, is the following: "If you think you hold any place in my estimation, you are very much mistaken." I must first see whether these words are proved; and I am of opinion that they are proved, as laid by Mr. Hall. The next question is, whether they are of such a tenor and meaning as would produce the effect contended for by Mr. Hall? Here arises a considerable

difficulty as to the time when, and the circumstances under which these words were spoken ; and I am utterly unable to fix the time or the circumstances with any thing like due precision. I must say that, in my judgment, these were words of provocation ; that they are words denoting contempt, and what so much excites irritating feelings as words of contempt ? It is not in human nature patiently to submit to expressions denoting contempt. Thinking that Mr. Williams used these words, I am bound to consider them in pronouncing my judgment, which is this :—that Mr. Hall be suspended from entering the Church for the space of one week, and that he be condemned in the costs, save and except thirty pounds.

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I now proceed to the consideration of the next case.

The charge against Mr. Farlar is that of addressing these words to Mr. Williams. “ You fancy yourself the sultan of Hendon ; but I am come to teach you that we are not living in Barbary, and that you have not Turks to deal with ;” and shortly afterwards : “ Your impudence is unequalled by all the parsons of Surrey ;” and “ You are anything but a gentleman.” There is no doubt some discrepancy as to whether the word “ Tartary ” was not used instead of “ Barbary ;” but there can be no doubt that some of the expressions were used,—as “ You are anything but a gentleman ;” —“ You have more impudence than even the Surrey parsons.” I must say that, as to the expression of “ Surrey

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parsons," I entertain considerable doubt—I cannot make sense of that expression.

The witnesses are the same in this case as in the other; but this case is stronger as to the evidence, because one of the witnesses for the defence establishes brawling beyond all doubt. He deposes to the words "You are a disgrace to your cloth." It is clear that this observation is a brawling observation.

The conclusion, then, to which I come is, that the evidence establishes the charge in this case, and it remains, in this as in the preceding one, to see whether anything was said by Mr. Williams which ought with propriety to induce me to exercise any discretion with respect to costs.

Two circumstances are stated on behalf of Mr. Farlar; one is, that Mr. Williams said to him, "Such tricks may do at Kensington, but they will not do at Hendon." The other circumstance is, that when Mr. Farlar did not aspirate the letter "H," Mr. Williams noticed it, and told him it was "Hendon," and not "Endon."

With respect to the first, I think I am justified in saying that the burthen of proof has been discharged, and that the evidence does establish the fact, that the expression, "Such tricks may do at Kensington, but they will not do at Hendon," did escape the lips of Mr. Williams. As to the other, I have no doubt that Mr. Williams did notice the non-aspiration of the letter "H;" the dispute is, whether it was done in a mild or jeering manner? which, in the heat and excitement of the moment, might have been the case, and very likely to have given very great offence to Mr. Farlar. If Mr. Williams did

so commit himself, by speaking in a jeering manner, it was calculated to give great offence to Mr. Farlar, and his reply shews that there was an impression on his mind that Mr. Williams was ridiculing him; and it is unfortunate that Mr. Williams, considering his station and office, did not shew himself more his own master. It must be recollected that the clergyman of the parish ought to consider himself superior to his parishioners, and no provocation ought to tempt him to deviate from temper and calmness, or induce him to place himself on a level with ordinary vestrymen. The same expression from an ordinary vestryman would be less censurable than from the clergyman, whose duty it is to keep the peace and set an example to others. I think that both the circumstances were calculated to increase the excitement in Mr. Farlar's mind, and that they cannot be justified on the part of Mr. Williams; and so thinking, I believe I shall come to a right and just conclusion, if, in this case, as in the preceding, I condemn the party in the costs, remitting thirty pounds: with the same sentence of a week's suspension.

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PREROGATIVE COURT OF CANTERBURY.

BUTLIN against BARRY.

JUDGMENT.

SIR HERBERT JENNER.

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A will being drawn by a solicitor, in which a considerable legacy was given to himself and to the medical man and butler of the deceased, excluding an only son, the presumption of law is strong against the act, and the Court requires strong evidence to satisfy it that the act is the real and voluntary act of the testator. Under the circumstances sufficient evidence being given of the capacity of the

deceased and of his knowledge of the contents of the instrument, the Court pronounced for the will and condemned the son in costs from the time of giving in his allegation.

THE question in this case respects the validity of a paper propounded as the last will and testament of Mr. Pendock Barry, formerly Neale, of Toller-ton Hall, Nottinghamshire, who died on the 18th of March, 1833, at the age of between seventy-five and seventy-six, a widower, leaving behind him an only son, Mr. Pendock Barry Barry, his heir-at-law, and the only person entitled to the personal estate of the deceased in case he had died intestate. The deceased was tenant for life of landed estates of the value of between three and four thousand a-year, to which the son succeeded. The personal property amounts to about thirteen thousand pounds, the whole of which is given by the will propounded to persons who are in no degree related to the deceased. The will is dated on the 14th of September, 1827, and it purports to have been executed in the presence of three witnesses, the Rev. Leonard Chapman (who died in the lifetime of the deceased), Dr. Davidson, and Dr. Marsden, who attested the exe-

cution of it. By this will 3000*l.* are given to the deceased's butler, Samuel Whitehead, who had lived with him in that capacity since 1810, and 300*l.* to Mrs. Whitehead, his wife, who had been housekeeper to the deceased since 1823; 3000*l.* to Mr. Percy, his solicitor, and 2000*l.* to Mr. Butlin, his medical attendant, together with the residue of the property, after payment of some small legacies to the servants, and this gentleman is appointed sole executor. The sum of 10,000*l.* had been secured on the real estate for the benefit of the deceased's daughter, and to this the deceased succeeded, on the death of his daughter, intestate and a spinster, in 1821, and this constituted a charge on the real estate in exoneration of the personalty. The will was prepared by Mr. Percy, who had been the deceased's agent and solicitor for many years, and was executed in duplicate in his office; it is propounded by Mr. Butlin, the executor, and is opposed by Mr. Barry Barry, the son.

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The proceedings in the cause commenced in 1833, and it is proper that I should state a few circumstances accounting for the delay which has occurred. The pleas were long, and objections were taken to some parts of the evidence; many of the objections were sustained by the Court, and from that decision of the Court an appeal was interposed to the Privy Council, but the Judicial Committee pronounced against such appeal and remitted the cause. (a)

(a) The cause came on for hearing on the 30th of November, 1835, and was continued for several days, and much discussion took place as to the admissibility of parts of the depositions of the witnesses. In the first place an objection was taken to the tes-

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When the cause again came on, the arguments of counsel occupied several days, and the Court thought it to be its duty to take time to consider its

timony of John Gough, the managing clerk of Mr. Percy, who drew the will; he had been examined on Mr. Butlin's first allegation, which pleaded the instructions for, and the execution of the will; the witness was not present when any instructions were given, nor when the will was executed.

Lushington and Addams.

The first objection is, that Mr. Gough ought not to have been examined at all upon this plea, which is not the usual common condidit. He does not prove that the will was drawn after instructions had been given; he knows nothing of instructions; nor does he prove execution, he was not present and can say nothing on the point. But supposing Mr. Gough to be a competent witness on this plea, the next objection is to parts of his deposition. The witness speaks to instructions being given, from a memorandum written by Mr. Percy, if this were allowed any party could furnish evidence for his own purposes; a witness cannot refer to a memorandum not written by himself; the whole comes to this, the witness deposes to a fact because A. B. made a memorandum to that effect. In this case there are no instructions from the deceased, and the party himself makes a memorandum, in order to supply the defect: the witness says "none of the entries relating to the deceased are in my handwriting;" the book then was not admissible for the purpose of refreshing his memory. The witness ought only to depose to facts within his own knowledge, or, what he heard from the *deceased* himself, he goes on to depose "by reference to the office journal,"—this is inadmissible.

The King's Advocate and Phillimore.

The allegation on which this witness has been examined, is somewhat different from a condidit, because of the death of one of the attesting witnesses, but in other respects it is the same, and it was competent to the party to examine Mr. Gough upon it,—upon the plea as to the drawing up of the will, the person who drew the will may surely be produced as a witness. As to the second objection, the witness had a right to refer to the journal in

opinion, rather than to delay proceeding with the other business.

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The first allegation propounding the will was in order to fix the dates, he says "I daily saw the journal," it was not therefore the private journal of Mr. Percy but the journal of the office—they cited *Burrough v. Martin*. (a)

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Two objections have been taken to the evidence of John Gough, the clerk to Mr. Percy, a legatee, and the drawer of the will propounded. The first objection was to the whole of the testimony of this witness, on the ground that he ought not to have been produced upon the plea; that the plea was not a *condidit*, but that it merely pleaded instructions from the deceased and execution *in the presence of the witnesses whose names are subscribed thereto*, and it is contended that no one could be properly produced to prove this, but those who took the instructions, or those who attested the execution; but with the exception of these words the plea is the same as the usual *condidit*—the witness cannot prove instructions, but he might prove reading over; he might have been then present, and not at the execution; if the attesting witnesses were dead, the Court in such case could have had no evidence of reading over, or of any circumstances attending the making of the will at all. I think it would be going beyond anything ever yet done in this Court if this objection were held to be good. To come then to the particular parts of the evidence objected to, with respect to the reference to the journal, I think that the witness when speaking of facts within his own knowledge might refer to the journal in order to fix the date; the journal it seems was kept in the office, and the entries were made by the persons who did the business; it would not, however, be competent to the witness to speak to the facts themselves from the books. With regard to the entries made by Mr. Percy, they are clearly not evidence, nor in the nature of evidence, otherwise as was observed by counsel, a party might fabricate evidence for his own purposes.

The Court directed those parts of the evidence of the witness, which were founded upon the entries themselves in the journal to be expunged.

Upon an allegation pleading the instructions for the drawing up and the execution of a will, the clerk who drew the will, although he knew nothing of the instructions or of the execution, is a competent witness.

The clerk in a solicitor's office when speaking to facts within his own knowledge may refer to the "office journal" in order to fix the dates of those facts; but cannot speak to facts (not within his knowledge) from entries in the journal, not in his own handwriting.

1837. effect a common *condidit*, pleading in substance the
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necessary, in consequence of the death of one of the
attesting witnesses—on that plea four witnesses
have been examined. The first allegation on behalf of the son consisted of forty-five articles, setting forth the history of the deceased almost from his birth, upon which sixty-three witnesses have been examined—and no fewer than forty-nine upon the second article. A responsive allegation, on behalf of the executor consisted of forty-eight articles, on which forty-three witnesses have been examined, and additional articles were afterwards given in, on which two witnesses were examined. A further allegation on behalf of the son was admitted, consisting of twelve articles, on which nineteen witnesses have been examined. After publication, an exceptive allegation was admitted, consisting of three articles, on which eighteen witnesses have been examined. So that there have been five pleas, consisting of one hundred and thirteen arti-

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Further objections were taken to parts of the depositions of the witnesses, both on the one side and the other, and the Court having admitted some of the objections on behalf of Mr. Butlin, and overruled some of the objections on behalf of Mr. Barry, the proctor of Mr. Barry alleged an appeal, and the usual steps were taken by him and an inhibition and citation were served upon the proctor of Mr. Butlin, to which he appeared under protest, alleging that the order of the judge complained of was not an appealable grievance ; that the whole hearing of a cause was but one continuous act, and that it is not competent to a party to interpose an appeal until sentence be given in the cause ; and the Judicial Committee being of that opinion, the protest was sustained with 10*l.* costs and the cause remitted. (a.)

(a) See Moore's Privy Council Cases, Vol. 1, p. 98.

cles, on which one hundred and forty-nine witnesses have been examined. The interrogatories and exhibits are very numerous and at great length, and I must say that this mass of evidence, unprecedented in this Court, and the accumulation of expense caused thereby, are utterly disproportionate to the question at stake between the parties, 13,000*l.* or 14,000*l.* The Court will endeavour to prevent the recurrence of such inconvenience and injustice, which tends to reflect no degree of credit on the manner in which the proceedings of the Court are conducted. It is certainly true, that the case presents itself to the Court in a peculiar shape; the will was prepared by the deceased's solicitor, for his own benefit and that of the deceased's medical attendant and butler, all strangers in blood, and the latter having acquired an influence over him. This creates a strong presumption against the act and which can only be repelled by strong and clear evidence. The Court cannot presume anything in favour of such a will, still the presumption against it may be repelled; and the question is, whether, according to the principles of this Court, the evidence is sufficient for that purpose.

Now the principles applicable to such a case are to be collected from a variety of cases in this Court, sanctioned by other Courts, (*Paske v. Ollatt*, (a) *Ingram v. Wyatt*, (b) and other cases, founded upon precedents in the earliest times,) the result of which is, that where a paper has been drawn up by a person for his own benefit, or where he takes a considerable benefit under it, the presumption lies strongly against the act, and it requires to be proved by satis-

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(a) 2 Phill. 323.

(b) 4 Hagg. Eccl. Rep. 384.

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factory evidence *dehors* the instrument, that it was the free and voluntary act of a capable testator and executed with a full knowledge of its contents and effect. This presumption is still stronger where an only son is excluded, and requires to be removed by clear evidence of rational motives in the deceased to make such a disposition, by parol evidence, the *res gestæ*, or documentary evidence, which is the strongest of all.

What then is the case set up by the son in opposition to the will? the second article of Mr. Barry Barry's allegation pleads, that the deceased throughout his life was a person of very weak and slender capacity, that he was educated in part at Harrow School, and from thence was removed to Oxford, where he resided at intervals for about four years, but that he quitted the University without taking any degree; that at the University he acquired a habit of drinking to excess in which he ever after indulged, and by which his mental faculties became still further weakened and impaired; and that from such and other causes he became a mere passive instrument in the hands, and solely and entirely under the undue influence and control, of those persons immediately about him successively, by certain of whom the execution in fact of the pretended will was unduly procured.

The third pleads—that in 1780, the deceased, who was at the time about twenty-three years of age, intermarried with Susanna Neale, his first cousin; that the said Susanna Neale was a lady of great sense and discretion, and from the time of her marriage until her death in 1811, exclusively managed all the deceased's affairs; that she re-

ceived and paid all monies, wrote all letters (some of which were afterwards copied by the deceased), filled up all checks, (to which the deceased only affixed his signature) and transacted all matters of business whatsoever; and that the different agents and attornies, as well those of the deceased himself, as for the most part those of the persons with whom the deceased nominally transacted any matters of business, constantly and upon all occasions, addressed themselves exclusively to, and really transacted such matters of business with, the said Susanna Neale.

The fourth pleads—that during the lifetime of the said Susanna Neale, the servants of the deceased had orders not to contradict him and to keep a strict watch over him to prevent his doing mischief to himself or others; that he frequently destroyed property, as watches and other articles of value; that he would frequently seat himself on the box of a carriage (in which there were no horses) in a box-coat and with a whip in his hand and pretend to drive; that he often saddled one of his men and then mounted on the saddle booted and spurred, and pretended to be riding; that after he had gone up to his bed-room and undressed for the night, he often threw his clothes out of window; that he was seldom or ever trusted with the possession of money to any considerable amount, and was utterly unable to compute, so that in reckoning up even very small sums, he had always recourse to his fingers, and could seldom notwithstanding perform the operation correctly; that during the lifetime of his said wife, the conduct of the deceased was in all respects silly, childish, and irrational, and he was generally

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considered to be and was treated as a person who was childish and imbecile.

So that, according to this plea, the deceased was wholly incapable of managing his affairs or of transacting any business, and was never competent to do so, and it would have been impossible, had this imbecility of mind been proved, to say that the will could be valid. The first question for the Court to determine, therefore, is the degree of incapacity proved in the cause. But it is admitted that Mr. Barry has overstated his case, for it was not contended in the argument that the deceased was wholly intestable, or actually insane or an idiot; but that he was naturally of a weak and imbecile mind and liable to imposition: now weakness of mind and imbecility are indefinite terms, and in respect to the meaning of which no two persons agree. The degree of capacity is, therefore, a question for the consideration of the Court, and it is one upon which the witnesses differ materially from each other; one considering the same act rational and consistent with sound sense which another pronounces irrational and absurd. It becomes necessary, therefore, to compare the testimony of the witnesses upon this point. Some of the facts deposed to occurred twenty, thirty, and even fifty and sixty years before the time when the witnesses were examined, and how can the Court rely upon depositions after such a length of time? Some of the facts, respecting the conduct of the deceased, are isolated instances from which the Court cannot draw inferences as to his usual habits, or as to the general character and complexion of his mind. Having travelled through this mass of evidence

over and over again, the Court does not feel itself called upon to go into the details given by every one of the witnesses,—a task beyond its physical powers; the utmost that can be required of the Court is, to state the result of the evidence, dwelling more minutely upon the most important parts.

(The Court then gave a summary of the history of the deceased. In 1772, he came into the possession of the property under the will of his uncle. The landed estates being strictly entailed upon the deceased's only son. In 1780, the deceased married his first cousin, Miss Neale (his own name), and the issue of this marriage was a daughter and a son, the former being one year older than the latter, who was born in 1783. In 1811, (when he took the name of Barry) his wife died, and shortly after, the daughter left her father's house and went to live at Bath, where she died in 1821. In July, 1813, the son left Tollerton Hall, under peculiar circumstances, previous to which the father and he had lived on terms of great affection, and the deceased continued to write affectionately to his son till 1814, when he withdrew his regard from him. The deceased lived at Tollerton in seclusion, never receiving visits from persons in the neighbourhood, and seldom going beyond the limits of his own property. His amusements were of a frivolous and trifling character; he was shy and timid, and it is stated that he was restrained by his butler, Whitehead, who had acquired an influence over him. He was in the habit of lying in bed during a great part of the day, his usual hour of rising being three o'clock, and of drinking to excess. In 1819, the son filed a bill in Chancery against his

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father for an injunction to prevent waste on the estate, and for an inventory of certain plate, being heir-looms, and the father not having filed an answer in the following year, the son sued out an attachment against him, upon which the answer was given. In December, 1819, Mr. Barry Barry went down to Tollerton to see his father, but was refused access to him, and on the ensuing day the deceased proceeded to Nottingham, and swore the peace against his son. In 1821, on the death of his daughter, the deceased came into possession of the property settled upon her, which was made a charge upon the real estates. In 1829, the deceased went to Buxton for a short time, and having returned to Tollerton Hall, he continued there till his death in 1833.)

The case in argument, on the part of the son, is one of original imbecility of mind, increased by habits of intemperance, rendering the deceased incompetent to transact any business, and there are witnesses who go the whole length of the plea: these are mostly servants, many of them in the service of Mr. Barry Barry. But the Court, from long experience, is aware that the opinion of such persons, as to capacity, is of all others most to be distrusted. Where these witnesses speak to facts, the Court will not distrust them either from the circumstance of their being servants, or that of their being in the service of the party; it is only that part of their evidence which contains comments upon or influences from facts, which the Court distrusts.

It must be admitted that the deceased was a man of weak mind. What is the idea which that term

presents to the minds of individuals best able to form an opinion.

Russell, who lived with the deceased for nearly twenty years, (and is now butler to Mr. Barry Barry), describes him as a man of very weak mind, but not an idiot; as shy, timid, and afraid of seeing strangers. He seldom drank less than two bottles of port a day, sometimes three. Whitehead exercised an influence over him.

Chatfield, the deceased's groom, now in Mr. Barry Barry's service, says the deceased was of weak mind, not like other gentlemen.

Duke, the gardener, who was in the deceased's service for twenty-four years, and very much with him, states that he was a man of very weak mind, and under the influence of Whitehead. He specifies absurd acts done by the deceased in the garden, and others which would go to shew that he was insane.

C. Russell, the deceased's coachman, says he was not like other gentlemen; he was all of a tremble if he had to do with strangers. Mrs. Neale managed his affairs. He cannot say he was childish, but he was not a gentleman "of parts." He could not count without the use of his fingers.

Millicent Naylor, an attendant upon Miss Neale, represents the deceased as not only incapable of managing his affairs, but approaching to idiotcy; as not better than a child of a year and a half old.

Dyson, who had opportunities of witnessing the conduct of the deceased, says he was not quite an idiot, but a very simple gentleman, and quite overruled by those about him. He used to indulge in drink—two bottles a day. He was a poor weak creature in the hands of Whitehead.

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Barlow, a tenant of the deceased, describes him as a poor weak creature, quite unable to manage his affairs.

Stones, a coach-maker, represents that he was weak and imbecile, and that he gave absurd directions; but he admits that, for forty years, he took his orders and charged for the execution of them.

Other servants concur in describing the deceased as a weak man, and occupied with frivolous amusements; but the facts they state do not go to his general habits.

Sir Richard Paul Jodrell, who knew the deceased from 1807 to 1812, is of opinion that he was a good humoured man, but of very weak intellect.

Mr. Gordon, who went with Mr. Barry Barry to visit his father in 1800, describes him as a weak, silly man, and very likely to be imposed upon.

There are two other witnesses on this part of the case, who are members of the deceased's family, or connected with it, and who are, therefore, capable of forming a true estimate of the character and conduct of the deceased,—the Rev. John Neale and Mr. Faulkner.

Mr. Neale is the brother of the deceased's wife. He was originally destined to the medical profession, afterwards went into the army, and as a *dernier resort*, took orders, and has a small curacy. He certainly represents the deceased as a person almost in a state of idiocy, incapable of doing anything for himself, or of knowing what he was about; he says that he drank four bottles of wine a day; that his intellects were impaired; that he took no interest in the management of his affairs; that from what he saw of the deceased, in 1811, he has no doubt

that the deceased was naturally so weak in intellect, and from his habits of indulgence, that he was a mere tool in the hands of others; that Mrs. Neale exclusively managed all her husband's affairs, wrote all his letters and cheques, and that every one who came to the deceased on business transacted it with Mrs. Neale. But when we look further into this gentleman's evidence, the Court is inclined to place no great reliance upon his opinion, his conduct being at variance with his opinion. He admits that the deceased took him and his two brothers under his protection, and was very liberal to them,—though he had said he was imbecile, and never did in his lifetime a liberal act,—and that he assisted in defraying the expense of their education; yet he says he was so weak in mind as to be incapable of counting ten, except with his fingers. “I feel grateful,” he says, “for acts of kindness from the deceased till I was excluded from the house.” It appears he lent him money to pay his brother's bills, which he knew the witness, with a curacy of 75*l.* a-year, could not pay; thereby shewing he could judge of his circumstances.

Mr. Faulkner, who, from his situation in life, had an opportunity of knowing and forming an accurate opinion of the deceased's character, says he was treated as a child; but this gentleman, falling into embarrassment, like Mr. Neale, applied to the deceased for relief, and receives assistance from the deceased through Whitehead.

Such is the general account given by the witnesses relied upon by Mr. Barry Barry as establishing the general incapacity of the deceased. The result is, that even on this evidence, the deceased

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Then what is the evidence on the other side, as to the capacity of the deceased? Mr. Banks, who married a sister of the wife of the Rev. Pendock Neale, speaks of him as a man of retired and reserved habits, but who conversed rationally and sensibly, and took that moderate share in conversation which a rational man would do. He says that he drank to excess, but that he never saw him intoxicated. Always considered him of sound mind, but not of strong mind; and that is the true description of the deceased. He was not a silly man, nor a learned and sensible man; but he was competent to transact the general business of life.

Mr. John Smith Wright considered him a weak-minded man, because he suffered his son to get such an ascendancy over him.

Mr. Samuel Wright, who had been acquainted with the deceased for sixty years, considers him as a person not of bright powers of mind, but capable of conversing on the topics of the day. His pursuits were not irrational or childish.

Two ladies depose that he was a weak, but not a silly man; that he was of gentlemanly manners, and presided with great propriety at the head of his table. He was a straightforward man, and conversed rationally on the topics of the day.

The general result of this part of the evidence is, that the deceased, though a man of no extraordinary powers of mind or attainments, was yet fully competent to the ordinary transactions of life; that he was peculiar in his habits, but polite and gentlemanly in his behaviour. He was treated

by his son as competent to acts of business. On his coming of age, it being necessary to raise money, a deed was executed, and no objection was made on the ground of the deceased's incompetency. He transacted money matters at his bankers, and never appeared deficient. He always came alone, and counted the money he received, and checked his accounts, as other gentlemen do. As far as general capacity goes, the Court cannot put the other evidence in competition with this.

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With regard to the ascendancy of Whitehead, the deceased had great confidence in him, no doubt, and possibly Whitehead may have abused it and plundered the deceased. The witnesses speak of entertainments given by Whitehead to his friends, and of the deceased having been under some degree of subjection to him, and there is no doubt, that on some occasions, Whitehead spoke of the deceased's directions as nonsensical and overruled them. But supposing all this was true, and that Whitehead plundered the deceased, his conduct may be reprehensible, but how does it affect Mr. Percy and Mr. Butlin? There is no suggestion that they ever exercised any influence over the deceased, or were in the habit of partaking of Whitehead's entertainments, nor is it likely that they should have entered into any conspiracy.

But are there not other circumstances to account for this disposition? It is said, there is no suggestion of any particular affection on the part of the deceased towards Mr. Butlin or Mr. Percy; but the disposition may be accounted for on other grounds than his partiality towards these persons. Supposing the son to be set aside on account of his

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misconduct, who could stand in competition with Mr. Butlin and Mr. Percy? Not Mr. Neale nor Mr. Faulkner. The case turns on the feelings of the father towards the son, and on the conduct of the son towards the father. I think the conduct of the son has led to the whole, and that he is the conspirator against himself. The son was the cause of his own exclusion, and although there was an affection between the son and the mother, during her life, and although a great degree of regard and affection subsisted between the deceased and Mr. Barry Barry up to a certain period of time, the conduct of the son must have rendered it impossible for father and son to continue on terms of intimacy, and that was the real cause of the property being given to other persons.

The Court is satisfied that the plea of the executor, "that Mr. Barry Barry was, from the earliest period of his life, of profligate and depraved habits," is not made out. It is in evidence that Mr. Barry Barry is a gentleman of high spirit and of strong passions easily excited. The great misfortune of his life is, that he was the idol of his father and mother, who indulged him so much that they could not control him in after life: his passions, especially when under the influence of intoxication, got the better of him, and led him into actions which he must have repented of, not only towards his father and mother, but his uncle, the Rev. Pendock Neale, who had him bound over to keep the peace in May, 1813. The deceased, however, at this time, took part with his son, and refused to hold any intercourse with his brother-in-law. In this year a charge was brought against

Mr. Barry Barry by a man named Hickling, of an indecent assault, represented to have taken place on the 24th June, 1813. Mr. Barry Barry left Tollerton Hall on the 6th July, and it is pleaded by him that he did so because he supposed a warrant was out against him on account of another act of violence against his uncle. But it appears, from the bill of costs, that he was aware of the charge made against him by Hickling on the 3rd July, and it is in evidence that he said he was going to leave the country. The subject of this charge is first introduced in Mr. Barry Barry's allegation, where it is pleaded that it was an invention of his uncle, Mr. Pendock Neale, in order to get him out of the country; but that no effectual steps were taken to prosecute the charge, and that Hickling had expressed regret that he had been induced to make it, at the instigation of Mr. Neale. When the allegation of the executor was brought in, this was counterpleaded, and it was stated that steps were taken to prosecute the charge, but they were defeated by the withdrawal of Mr. Barry Barry. In Mr. Barry Barry's second allegation, an extract of a bill of costs of his solicitor was pleaded, but it was contended, on the other side, that the bill itself should be brought in, and, although it was alleged that it contained nothing else relative to the matter at issue in the cause, the Court directed it to be brought in, and it then appeared that, whereas one of the matters at issue was, whether Mr. Barry Barry had left Tollerton Hall with a knowledge of the nature of the charge made against him, the bill contained charges by his solicitor, at different dates, for attendance with reference to the warrant against him,

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and for letters respecting his non-intention to stand the charge : shewing a perfect knowledge on the part of Mr. Barry Barry of the nature of the charge. This was an attempt to impose upon the Court.

When Mr. Barry Barry retired from Tollerton, the deceased was at first convinced that the charge was set up by Mr. Pendock Neale, to get rid of his nephew, and he continued to correspond with his son down to March, 1814.

An allegation was given in by Mr. Barry Barry, pleading certain declarations by Mr. Neale and by Hickling, to the effect that the former had instigated the latter to make the charge ; but the Court was of opinion that this plea was inadmissible, unless the facts were communicated to the deceased. The allegation was then reformed, and pleaded that they were communicated to the deceased, and the allegation was admitted, the Court not supposing that this was done only to make the plea admissible. But when the evidence was taken, it shewed that no such communication was made.

So far from no steps having been taken to follow up the indictment against Mr. Barry Barry, in the Summer Assizes, when the bill was found, a warrant issued against him, and had he not absconded, he would then have been tried. He returned to England under the feigned name of Smith, and in March, 1814, he gave notice that he was ready to take his trial at the next assizes. Counsel were retained for him, and everything was ready for the trial, but, when it was expected to come on, Mr. Barry Barry, by the advice of his counsel, declined to appear, and went away again, and he did not return till after the death of Hickling, in 1827, Mr.

Pendock Neale having died in 1816 : so that, if no effectual steps were taken, it was not the fault of the prosecutor, but of Mr. Barry Barry himself.

The Court has nothing to do with the question as to the guilt or innocence of Mr. Barry Barry, but with the effect produced on the mind of the deceased,—whether, in fact, a change of opinion took place as to the innocence of his son. What was the consequence of his proceeding? The deceased expected that the trial would come on, and that his son would appear and clear his character; but when he found his son declining to come forward and justify his character to the world, the deceased, if he had a spark of feeling, must have believed, notwithstanding his affection for him, that there was some foundation for the charge. That it produced this effect upon the deceased is clear, for, from this time, he gave up all correspondence with him. But the extraordinary part of the case is, that after Mr. Barry Barry declined to stand his trial, the latter never saw his father, and never explained to him the grounds of his proceeding. It was natural for a person of the deceased's shy temper, to retire, upon this, into greater seclusion than before, and that he should be alarmed at the approach of strangers, who would recognize him as the father of such a son. All the witnesses concur in stating that he did not speak of his son after this but in terms of pity, as his “unfortunate son,” or “that unfortunate gentleman.” There was no attempt at conciliation on the part of the son; every thing was hostile. In 1819, when Mr. Barry Barry came down to Tollerton Hall, Whitehead was absent, but the deceased refused to receive him,

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shewing that he acted on his own feelings. This visit created confusion in the family ; the deceased, apprehensive of personal violence, wrote to Mr. Percy to come to his assistance, and Mr. Percy accordingly went to Tollerton Hall, with two other persons, to whom the deceased gave an account of the occurrence, conducting himself in a perfectly collected and rational manner. He made a deposition before a magistrate ; but as Mr. Barry Barry left the place, there was no necessity for the intervention of the magistrate. These facts shew not only the capacity of the deceased, but his dislike to his son. In 1820, the proceedings were going on in Chancery, and the son writes in terms not likely to conciliate his father, assuming an authority to dictate to him, and employing offensive language.

Under these circumstances, the Court, perhaps, would not have been surprised at anything the deceased might have done with respect to his son ; but no immediate steps were taken to make a will. In 1821, the daughter died ; in 1822, the 10,000*l.* was raised ; in 1823, Mrs. Gentry, the housekeeper, left, and Miss Cooper came, who married Whitehead soon after ; in 1826 or 1827, the deceased was taken extremely ill, and was attended by Mr. Butlin.

It is to be regretted that Mr. Percy should be the person to draw the will ; but the character of the deceased should be considered, and may in some degree account for it. One of the inconveniences attending this circumstance, however, is, that Mr. Percy cannot be examined as a witness. He was, indeed, produced as a witness, having assigned his legacy to a charitable foundation ; but Mr. Barry

Barry's proctor objected, and the Commissioner, before whom the examination took place, was informed that he was liable to prosecution and penalties if he accepted the trust, and consequently Mr. Percy was not examined. This was irregular, and both parties seem to have lost their way. The Court has already expressed its sentiments upon this point, in the course of the proceedings. The objection to the competency of the witness should have been made at the time of hearing, or the Court might have been applied to, that his deposition should not be published : instead of which, the Court has been deprived of the evidence of Mr. Percy, by the objection on the part of Mr. Barry Barry, the person now complaining that Mr. Percy was not examined.

The principal witness as to the preparation of the will is Mr. Gough. The deceased had declared he had done with the Neales. The son was not destitute, having the real estate, worth 3000*l.* or 4000*l.* a-year. What other persons were likely to have been the objects of his bounty ? Why those with whom he associated,—Mr. Percy, his solicitor and agent, Mr. Butlin, his medical attendant, and Mr. Smith, the incumbent of the parish—there were no other persons with whom the deceased was in the habit of associating, and to them it was not improbable the deceased, from the manner in which they had acted towards him, would have left a portion of his property. Whitehead may have misconducted himself, but the deceased was not conscious of it, and he had great regard for and confidence in him. The Court, therefore, cannot say that the disposition of the property, under the circumstances, was very improbable. There is nothing to shew that

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the deceased did not act in this matter as a free agent ; there is nothing to shew importunity. He goes to Mr. Percy in his own carriage, openly, unattended by Whitehead, and the general result of the evidence respecting the instructions for the will, its preparation and execution, is such as in my opinion to satisfy the requisites of the law, shewing that the deceased was able to understand the act he was about to do.

The case might stop here ; but there are later circumstances shewing the capacity, volition, and free agency of the deceased. The next day, he went to his banker and drew out money. He gave directions for the painting of his house. He went to Buxton, and in his conduct there, and during the whole time from the execution of the will down to his death, there is nothing from which the Court can infer that the deceased was in any other condition than capable of performing the ordinary business of life. There is nothing whatever in the evidence to shew that there has been any conspiracy to obtain the will, which is but the natural effect of his son's conduct on the mind of the deceased.

I have no doubt or hesitation in pronouncing for the validity of this will, and in decreeing probate of it to Mr. Butlin, the executor. Had the inquiry been conducted in the usual form, and without such unnecessary expense, the Court, under the circumstances, might have been inclined to suffer each party to pay their own costs ; but seeing the manner in which this suit has been conducted, and that if each party paid their own costs, the burthen would fall upon Mr. Butlin, who of all persons is the least connected with anything improper ; I am of opinion

to condemn Mr. Barry Barry in the costs, from the time of his giving in the allegation, which has given rise to the whole of the discussions and expense.

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JUDICIAL COMMITTEE OF THE PRIVY COUNCIL. (a)

On Appeal.

BARRY v. BUTLIN.

1838.

From the above sentence in the Prerogative Court, an appeal was prosecuted on behalf of Mr. Barry Barry to the Privy Council, and the cause was argued before the Judicial Committee, (present Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, and the Right Hon. Thos. Erskine, C. J. in Bankruptcy), by Mr. Cresswell and Dr. Addams for the Appellant, and by the Queen's Advocate and Mr. Thesiger for the Respondent, and the following judgment was delivered by

December 4th,
5th, 6th, 7th,
and 8th.

BARRY
against
BUTLIN.

(a) The Editor does not profess to report the decisions of the Judicial Committee of the Privy Council; but the principles of law, laid down by their lordships in the case of "Barry v. Butlin," being frequently referred to in questions arising in the Prerogative Court, he has thought that he might render an acceptable service to the profession, by inserting the judgment delivered in that case, by Mr. Baron Park, to whom the Editor begs to tender his sincere thanks for having furnished him with a copy of that judgment.

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—
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—

The *onus probandi* in every case lies upon the party who propounds a will.

Where the party who prepares a will takes a benefit under it, that is a circumstance which excites the suspicion of the Court, and unless that suspicion be removed, the Court will not pronounce in favour of the instrument.

—
A will prepared by the deceased's solicitor, under which he took a considerable benefit, the only son of the deceased being excluded, and the deceased being of weak, though of testable capacity, under the circumstances, pronounced for: affirming the sentence of the Prerogative Court, with costs.

MR. BARON PARKE.

The rules of law, according to which cases of this nature are to be decided, do not admit of any dispute, so far as they are necessary to the determination of the present appeal: and they have been acquiesced in on both sides. These rules are two, the first that the *onus probandi* lies in every case upon the party propounding a will; and he must satisfy the conscience of the Court that the instrument so propounded, is the last will of a free and capable testator.

The second is, that if a party writes, or prepares a will under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.

These principles, to the extent that I have stated, are well established. The former is undisputed. The latter is laid down by Sir John Nicholl in substance in *Paske v. Ollatt*, (a) *Ingram v. Wyatt*, (b) and *Billinghurst v. Vickers*, (c) and is stated by that very learned and experienced judge to have been handed down to him by his predecessors: and this tribunal has sanctioned and acted upon it in a recent case, that of *Baker and Batt*.

Their lordships are fully sensible of the wisdom of this rule and the importance of its practical application on all occasions; at the same time their

(a) 2. Phill. 323. (b) 1. Hagg. 388. (c) 1 Phill. 187.

lordships think it fit to observe, especially as there has been some discussion upon this point, towards the close of this inquiry, that some of the expressions reported to have been used by Sir John Nicholl, in laying down this doctrine, appear to them to be somewhat equivocal and capable of leading into error in the investigation and decision of questions of this nature. It is said that where the party benefited prepares the will, "the presumption and *onus probandi* is against the instrument, and the proof must go not merely to the act of signing, but to the knowledge of the contents of the paper," (a) and that "where the capacity is doubtful there must be proof of *instructions, or reading over.*" (b) If, by these expressions, the learned judge meant merely to say, that there are cases of wills prepared by a legatee so pregnant with suspicion, that they ought to be pronounced against in the absence of evidence in support of them, and that extending to clear proof of the actual knowledge of the contents by the supposed testator; and that instructions proceeding from him, or the reading over the instrument by or to him, are the most satisfactory evidence of such knowledge, we fully concur in the propositions so understood, in all probability the learned judge intended no more than this. But if the words used are to be construed *strictly*; if it is intended to be stated as a rule of law, that in every case in which the party preparing the will derives a benefit under it, the *onus probandi* is shifted, and that not only a certain measure, but a particular species of proof is therefore required from the party propounding the will, we feel bound to say that we conceive the

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doctrine to be incorrect. The strict meaning of the term "*onus probandi*" is this, that if no evidence is given by the party on whom the burthen is cast, the issue must be found against him. In all cases this *onus* is imposed on the party propounding a will; it is in general discharged by proof of capacity and the fact of execution; from which the knowledge of and assent to the contents of the instrument are ~~assumed~~ ^{presumed}, and it cannot be that the simple fact of the party who prepared the will, being himself a legatee, is in every case and under all circumstances, to create a contrary presumption, and to call upon the Court to pronounce against the will, unless additional evidence is produced to prove the knowledge of its contents by the deceased: a single instance of not unfrequent occurrence will test the truth of this proposition; a man of acknowledged competence and habits of business, worth 100,000*l.* leaves the bulk of his property to his family, and a legacy of 50*l.* to his confidential attorney, who prepared the will; would this fact throw the burthen of proof of actual cognizance by the testator of the contents of the will on the party propounding it, so that if such proof were not supplied, the will would be pronounced against? The answer is obvious, it would not. All that can be truly said is, that if a person, whether attorney or not, prepares a will with a legacy to himself, it is, at most, a suspicious circumstance of more or less weight, according to the facts of each particular case; in some of no weight at all, as in the case suggested, varying according to circumstances; for instance, the quantum of the legacy, and the proportion it bears to the property disposed of, and numerous other contingencies: but in no case amounting to more than a

circumstance of suspicion, demanding the vigilant care and circumspection of the Court in investigating the case, and calling upon it not to grant probate without full and entire satisfaction that the instrument did express the real intentions of the deceased. Nor can it be necessary that, *in all such cases*, even if the testator's capacity is doubtful, the precise species of evidence of the deceased's knowledge of the will is to be in the shape of instructions for, or reading over the instrument. They form, no doubt, the *most* satisfactory, but they are not the *only* satisfactory description of proof by which the cognizance of the contents of the will may be brought home to the deceased. The Court would naturally look for such evidence; in some cases it might be impossible to establish a will without it, but it has no right in every case to require it.

I have said thus much upon the rules of law applicable to this case, with the concurrence of all their lordships who heard the argument, not particularly with a view to the decision of this case; but in order to prevent any misconception upon a subject of so great practical importance; at the same time their lordships wish it to be distinctly understood, that entirely acquiescing in the propriety of the rule so qualified and explained, they should be extremely sorry if anything which has fallen from them should have the effect of impeding its full operation.

The case which their lordships have now to decide has been argued at the bar with much industry and ability on both sides; and all their lordships have besides had an ample opportunity of perusing and considering with due care and atten-

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tion the immense mass of evidence, more or less material, which was adduced in the Court below: as the result of that consideration has been to satisfy our minds that the decree of the judge of the Prerogative Court was right, it is not necessary to go into the same minute statement or comment upon the evidence in the cause in detail, which we should have thought it our duty to have done if we had happened to arrive at a different conclusion from that of the learned judge. Adopting the principles above laid down and admitted on both sides, we are all quite satisfied that the deceased was competent, and that the paper propounded by the respondent is proved to be his true last will, and to express his real intentions.

A tolerably just estimate may be formed of the character and mental powers of Mr. Barry the deceased, from the parol evidence on both sides, after making allowance for the bias under which the witnesses speak; and the written documents which are proved by the handwriting of the deceased. From these sources it may be collected that he was a person of slender capacity, of a retired disposition, indolent habits, addicted to drinking, somewhat singular in his appearance, frivolous, and occasionally even childish in his amusements and occupations. On the other hand, it is clear that he was not insane, and although the evidence embraces a period of more than fifty years, and an account of most of the transactions of his life, there is no satisfactory evidence of a single act, denoting that he was labouring under delusions, or indicating such a degree of folly as to shew that he was unfit to be trusted with the management of his own con-

cerns. Though certainly not a man of business, he was capable of transacting the ordinary affairs of life, and the letters produced, under his hand, and the parol evidence of the annual settlement of his accounts and attendance at the banker's, distinctly shew, that he paid considerable attention to his pecuniary concerns, and was competent to the conduct of his affairs. It is not indeed disputed on one side, but that he was of testable capacity, nor on the other that he was a person of weak mind ; as to the extent of that weakness, there is a difference, but admitting its existence, even to the degree represented on the part of the appellant, the only consequence will be, that it adds to the suspicion, which unquestionably belongs to the circumstance of the attorney who prepared the will, taking no less than a fourth of the estate, and the legatees taking the whole, to the exclusion of his own family, and calls upon us to watch the proof of the will itself with increased jealousy and suspicion. The question is, whether these grounds of suspicion have been satisfactorily removed, and the instrument proved to be the real will of the testator himself ?

That he should pass over his own relations is rendered highly probable under the unhappy circumstances of this case. If, all the other facts of the case being as they were, he had lived on terms of affectionate intercourse with his son ; had received him occasionally as an inmate of the house ; had habitually corresponded with him, and had always expressed for him parental regard, the case would have been one of much greater suspicion and more difficult to decide than it is ; but, unhappily, there is proof of estrangement from his only son,

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It is to be regretted that Mr. Percy should be the person to draw the will ; but the character of the deceased should be considered, and may in some degree account for it. One of the inconveniences attending this circumstance, however, is, that Mr. Percy cannot be examined as a witness. He was, indeed, produced as a witness, having assigned his legacy to a charitable foundation ; but Mr. Barry

Barry's proctor objected, and the Commissioner, before whom the examination took place, was informed that he was liable to prosecution and penalties if he accepted the trust, and consequently Mr. Percy was not examined. This was irregular, and both parties seem to have lost their way. The Court has already expressed its sentiments upon this point, in the course of the proceedings. The objection to the competency of the witness should have been made at the time of hearing, or the Court might have been applied to, that his deposition should not be published : instead of which, the Court has been deprived of the evidence of Mr. Percy, by the objection on the part of Mr. Barry Barry, the person now complaining that Mr. Percy was not examined.

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The case might stop here ; but there are later circumstances shewing the capacity, volition, and free agency of the deceased. The next day, he went to his banker and drew out money. He gave directions for the painting of his house. He went to Buxton, and in his conduct there, and during the whole time from the execution of the will down to his death, there is nothing from which the Court can infer that the deceased was in any other condition than capable of performing the ordinary business of life. There is nothing whatever in the evidence to shew that there has been any conspiracy to obtain the will, which is but the natural effect of his son's conduct on the mind of the deceased.

I have no doubt or hesitation in pronouncing for the validity of this will, and in decreeing probate of it to Mr. Butlin, the executor. Had the inquiry been conducted in the usual form, and without such unnecessary expense, the Court, under the circumstances, might have been inclined to suffer each party to pay their own costs ; but seeing the manner in which this suit has been conducted, and that if each party paid their own costs, the burthen would fall upon Mr. Butlin, who of all persons is the least connected with anything improper ; I am of opinion

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JUDICIAL COMMITTEE OF THE
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1838.

Dec. 24th.

BARRY
against
BUTLER.

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The rules of law, according to which cases of this nature are to be decided, do not admit of any dispute, so far as they are necessary to the determination of the present appeal: and they have been acquiesced in on both sides. These rules are two, the first that the *onus probandi* lies in every case upon the party propounding a will; and he must satisfy the conscience of the Court that the instrument so propounded, is the last will of a free and capable testator.

The second is, that if a party writes, or prepares a will under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.

These principles, to the extent that I have stated, are well established. The former is undisputed. The latter is laid down by Sir John Nicholl in substance in *Paske v. Ollatt*, (a) *Ingram v. Wyatt*, (b) and *Billinghurst v. Vickers*, (c) and is stated by that very learned and experienced judge to have been handed down to him by his predecessors: and this tribunal has sanctioned and acted upon it in a recent case, that of *Baker and Batt*.

Their lordships are fully sensible of the wisdom of this rule and the importance of its practical application on all occasions; at the same time their

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lordships think it fit to observe, especially as there has been some discussion upon this point, towards the close of this inquiry, that some of the expressions reported to have been used by Sir John Nicholl, in laying down this doctrine, appear to them to be somewhat equivocal and capable of leading into error in the investigation and decision of questions of this nature. It is said that where the party benefited prepares the will, "the presumption and *onus probandi* is against the instrument, and the proof must go not merely to the act of signing, but to the knowledge of the contents of the paper," (a) and that "where the capacity is doubtful there must be proof of *instructions, or reading over.*" (b) If, by these expressions, the learned judge meant merely to say, that there are cases of wills prepared by a legatee so pregnant with suspicion, that they ought to be pronounced against in the absence of evidence in support of them, and that extending to clear proof of the actual knowledge of the contents by the supposed testator; and that instructions proceeding from him, or the reading over the instrument by or to him, are the most satisfactory evidence of such knowledge, we fully concur in the propositions so understood, in all probability the learned judge intended no more than this. But if the words used are to be construed *strictly*; if it is intended to be stated as a rule of law, that in every case in which the party preparing the will derives a benefit under it, the *onus probandi* is shifted, and that not only a certain measure, but a particular species of proof is therefore required from the party propounding the will, we feel bound to say that we conceive the

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doctrine to be incorrect. The strict meaning of the term "*onus probandi*" is this, that if no evidence is given by the party on whom the burthen is cast, the issue must be found against him. In all cases this *onus* is imposed on the party propounding a will ; it is in general discharged by proof of capacity and the fact of execution ; from which the knowledge of and assent to the contents of the instrument are ~~assumed~~ assumed, and it cannot be that the simple fact of the party who prepared the will, being himself a legatee, is in every case and under all circumstances, to create a contrary presumption, and to call upon the Court to pronounce against the will, unless additional evidence is produced to prove the knowledge of its contents by the deceased : a single instance of not unfrequent occurrence will test the truth of this proposition ; a man of acknowledged competence and habits of business, worth 100,000*l.* leaves the bulk of his property to his family, and a legacy of 50*l.* to his confidential attorney, who prepared the will ; would this fact throw the burthen of proof of actual cognizance by the testator of the contents of the will on the party propounding it, so that if such proof were not supplied, the will would be pronounced against ? The answer is obvious, it would not. All that can be truly said is, that if a person, whether attorney or not, prepares a will with a legacy to himself, it is, at most, a suspicious circumstance of more or less weight, according to the facts of each particular case ; in some of no weight at all, as in the case suggested, varying according to circumstances ; for instance, the quantum of the legacy, and the proportion it bears to the property disposed of, and numerous other contingencies : but in no case amounting to more than a

circumstance of suspicion, demanding the vigilant care and circumspection of the Court in investigating the case, and calling upon it not to grant probate without full and entire satisfaction that the instrument did express the real intentions of the deceased. Nor can it be necessary that, *in all such cases*, even if the testator's capacity is doubtful, the precise species of evidence of the deceased's knowledge of the will is to be in the shape of instructions for, or reading over the instrument. They form, no doubt, the *most* satisfactory, but they are not the *only* satisfactory description of proof by which the cognizance of the contents of the will may be brought home to the deceased. The Court would naturally look for such evidence; in some cases it might be impossible to establish a will without it, but it has no right in every case to require it.

I have said thus much upon the rules of law applicable to this case, with the concurrence of all their lordships who heard the argument, not particularly with a view to the decision of this case; but in order to prevent any misconception upon a subject of so great practical importance; at the same time their lordships wish it to be distinctly understood, that entirely acquiescing in the propriety of the rule so qualified and explained, they should be extremely sorry if anything which has fallen from them should have the effect of impeding its full operation.

The case which their lordships have now to decide has been argued at the bar with much industry and ability on both sides; and all their lordships have besides had an ample opportunity of perusing and considering with due care and atten-

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tion the immense mass of evidence, more or less material, which was adduced in the Court below : as the result of that consideration has been to satisfy our minds that the decree of the judge of the Prerogative Court was right, it is not necessary to go into the same minute statement or comment upon the evidence in the cause in detail, which we should have thought it our duty to have done if we had happened to arrive at a different conclusion from that of the learned judge. Adopting the principles above laid down and admitted on both sides, we are all quite satisfied that the deceased was competent, and that the paper propounded by the respondent is proved to be his true last will, and to express his real intentions.

A tolerably just estimate may be formed of the character and mental powers of Mr. Barry the deceased, from the parol evidence on both sides, after making allowance for the bias under which the witnesses speak ; and the written documents which are proved by the handwriting of the deceased. From these sources it may be collected that he was a person of slender capacity, of a retired disposition, indolent habits, addicted to drinking, somewhat singular in his appearance, frivolous, and occasionally even childish in his amusements and occupations. On the other hand, it is clear that he was not insane, and although the evidence embraces a period of more than fifty years, and an account of most of the transactions of his life, there is no satisfactory evidence of a single act, denoting that he was labouring under delusions, or indicating such a degree of folly as to shew that he was unfit to be trusted with the management of his own con-

cerns. Though certainly not a man of business, he was capable of transacting the ordinary affairs of life, and the letters produced, under his hand, and the parol evidence of the annual settlement of his accounts and attendance at the banker's, distinctly shew, that he paid considerable attention to his pecuniary concerns, and was competent to the conduct of his affairs. It is not indeed disputed on one side, but that he was of testable capacity, nor on the other that he was a person of weak mind ; as to the extent of that weakness, there is a difference, but admitting its existence, even to the degree represented on the part of the appellant, the only consequence will be, that it adds to the suspicion, which unquestionably belongs to the circumstance of the attorney who prepared the will, taking no less than a fourth of the estate, and the legatees taking the whole, to the exclusion of his own family, and calls upon us to watch the proof of the will itself with increased jealousy and suspicion. The question is, whether these grounds of suspicion have been satisfactorily removed, and the instrument proved to be the real will of the testator himself ?

That he should pass over his own relations is rendered highly probable under the unhappy circumstances of this case. If, all the other facts of the case being as they were, he had lived on terms of affectionate intercourse with his son ; had received him occasionally as an inmate of the house ; had habitually corresponded with him, and had always expressed for him parental regard, the case would have been one of much greater suspicion and more difficult to decide than it is ; but, unhappily, there is proof of estrangement from his only son,

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so clear and distinct, as to admit of no doubt, and upon grounds which, whether the charge against the son were true or false, cannot assuredly be deemed irrational. Though Mr. Barry Barry had been guilty of the violent conduct which is deposed to by some of the witnesses, and that operating on the timidity of his father might have sometimes excited his fears, it is clear from the correspondence, that his father was on a friendly footing with him, and professed much regard for him, even after that gentleman had absconded, to avoid being taken on a bench warrant founded upon the charge against him; but after the time that he declined to take his trial at the assizes in March, 1814, and thereby afforded a strong ground for believing that the charge was true, all intercourse ceased; the deceased never wrote to, or saw his son afterwards—he held no communication whatever with him, and in December, 1819, when in the absence of Whitehead and Butlin, under whose control the deceased is supposed to have been, Mr. Barry Barry went to his father's house, his father himself, of his own accord excluded him from his presence; and it appears to be clear, that from the month of March, 1814, he ceased to speak of him, except as an unfortunate and unhappy man. In this state of complete alienation from his son, it is by no means unnatural to suppose that he would not make him the object of his bounty, but that he would seek elsewhere for those on whom he would bestow it. After his daughter's death in 1821, he had no relations except the Neales, from them also it is equally clear that his regards, if he ever entertained any, were estranged. With Pendock, who died in

September, 1816, he had unfortunately quarrelled, and he kept up no intercourse with the other members of that family; under these circumstances, it is highly probable that he would make a will, in order to prevent his son enjoying his property, and that as none of his relations were on terms of friendship with him, he would bestow his bounty on those persons who were, and none seem to have been in habits of intercourse with him more than Mr. Percy and Mr. Butlin, and it is by no means improbable that he would give a part to an old servant, in whom he had reposed great confidence and trust. It is true that this confidence was in some respects misplaced, and Whitehead seems to have taken liberties in his master's house, which he could hardly have sanctioned, but it does not appear that his master knew it, and he was intrusted to the last with the management of his domestic affairs.

With these probabilities then in favour of the will propounded, let us look at the evidence of the factum, which, though not so strong as direct proof of written instructions, to the full extent of the will, or direct proof that it was read over, is still of a satisfactory nature, and with the other circumstances to which I have adverted, leaves the mind perfectly satisfied that the instrument expresses his real wishes.

In the first place, it is a fact beyond dispute that Mr. Percy, who prepared the will, at all events *meant* that it should be fairly and openly executed in the presence of respectable witnesses. Mr. Smith was certainly applied to by him for that purpose, and could not attend. Dr. Davidson and

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shewing that he acted on his own feelings. This visit created confusion in the family ; the deceased, apprehensive of personal violence, wrote to Mr. Percy to come to his assistance, and Mr. Percy accordingly went to Tollerton Hall, with two other persons, to whom the deceased gave an account of the occurrence, conducting himself in a perfectly collected and rational manner. He made a deposition before a magistrate ; but as Mr. Barry Barry left the place, there was no necessity for the intervention of the magistrate. These facts shew not only the capacity of the deceased, but his dislike to his son. In 1820, the proceedings were going on in Chancery, and the son writes in terms not likely to conciliate his father, assuming an authority to dictate to him, and employing offensive language.

Under these circumstances, the Court, perhaps, would not have been surprised at anything the deceased might have done with respect to his son ; but no immediate steps were taken to make a will. In 1821, the daughter died ; in 1822, the 10,000*l.* was raised ; in 1823, Mrs. Gentry, the housekeeper, left, and Miss Cooper came, who married Whitehead soon after ; in 1826 or 1827, the deceased was taken extremely ill, and was attended by Mr. Butlin.

It is to be regretted that Mr. Percy should be the person to draw the will ; but the character of the deceased should be considered, and may in some degree account for it. One of the inconveniences attending this circumstance, however, is, that Mr. Percy cannot be examined as a witness. He was, indeed, produced as a witness, having assigned his legacy to a charitable foundation ; but Mr. Barry

Barry's proctor objected, and the Commissioner, before whom the examination took place, was informed that he was liable to prosecution and penalties if he accepted the trust, and consequently Mr. Percy was not examined. This was irregular, and both parties seem to have lost their way. The Court has already expressed its sentiments upon this point, in the course of the proceedings. The objection to the competency of the witness should have been made at the time of hearing, or the Court might have been applied to, that his deposition should not be published : instead of which, the Court has been deprived of the evidence of Mr. Percy, by the objection on the part of Mr. Barry Barry, the person now complaining that Mr. Percy was not examined.

The principal witness as to the preparation of the will is Mr. Gough. The deceased had declared he had done with the Neales. The son was not destitute, having the real estate, worth 3000*l.* or 4000*l.* a-year. What other persons were likely to have been the objects of his bounty ? Why those with whom he associated,—Mr. Percy, his solicitor and agent, Mr. Butlin, his medical attendant, and Mr. Smith, the incumbent of the parish—there were no other persons with whom the deceased was in the habit of associating, and to them it was not improbable the deceased, from the manner in which they had acted towards him, would have left a portion of his property. Whitehead may have misconducted himself, but the deceased was not conscious of it, and he had great regard for and confidence in him. The Court, therefore, cannot say that the disposition of the property, under the circumstances, was very improbable. There is nothing to shew that

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the deceased did not act in this matter as a free agent ; there is nothing to shew importunity. He goes to Mr. Percy in his own carriage, openly, unattended by Whitehead, and the general result of the evidence respecting the instructions for the will, its preparation and execution, is such as in my opinion to satisfy the requisites of the law, shewing that the deceased was able to understand the act he was about to do.

The case might stop here ; but there are later circumstances shewing the capacity, volition, and free agency of the deceased. The next day, he went to his banker and drew out money. He gave directions for the painting of his house. He went to Buxton, and in his conduct there, and during the whole time from the execution of the will down to his death, there is nothing from which the Court can infer that the deceased was in any other condition than capable of performing the ordinary business of life. There is nothing whatever in the evidence to shew that there has been any conspiracy to obtain the will, which is but the natural effect of his son's conduct on the mind of the deceased.

I have no doubt or hesitation in pronouncing for the validity of this will, and in decreeing probate of it to Mr. Butlin, the executor. Had the inquiry been conducted in the usual form, and without such unnecessary expense, the Court, under the circumstances, might have been inclined to suffer each party to pay their own costs ; but seeing the manner in which this suit has been conducted, and that if each party paid their own costs, the burthen would fall upon Mr. Butlin, who of all persons is the least connected with anything improper ; I am of opinion

to condemn Mr. Barry Barry in the costs, from the time of his giving in the allegation, which has given rise to the whole of the discussions and expense.

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JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL. (a)

On Appeal.

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From the above sentence in the Prerogative Court, an appeal was prosecuted on behalf of Mr. Barry Barry to the Privy Council, and the cause was argued before the Judicial Committee, (present Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, and the Right Hon. Thos. Erskine, C. J. in Bankruptcy), by Mr. Cresswell and Dr. Addams for the Appellant, and by the Queen's Advocate and Mr. Thesiger for the Respondent, and the following judgment was delivered by

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(a) The Editor does not profess to report the decisions of the Judicial Committee of the Privy Council; but the principles of law, laid down by their lordships in the case of "Barry v. Butlin," being frequently referred to in questions arising in the Prerogative Court, he has thought that he might render an acceptable service to the profession, by inserting the judgment delivered in that case, by Mr. Baron Park, to whom the Editor begs to tender his sincere thanks for having furnished him with a copy of that judgment.

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The *onus probandi* in every case lies upon the party who propounds a will.

Where the party who prepares a will takes a benefit under it, that is a circumstance which excites the suspicion of the Court, and unless that suspicion be removed, the Court will not pronounce in favour of the instrument.

A will prepared by the deceased's solicitor, under which he took a considerable benefit, the only son of the deceased being excluded, and the deceased being of weak, though of testable capacity, under the circumstances, pronounced for: affirming the sentence of the Prerogative Court, with costs.

MR. BARON PARKE.

The rules of law, according to which cases of this nature are to be decided, do not admit of any dispute, so far as they are necessary to the determination of the present appeal: and they have been acquiesced in on both sides. These rules are two, the first that the *onus probandi* lies in every case upon the party propounding a will; and he must satisfy the conscience of the Court that the instrument so propounded, is the last will of a free and capable testator.

The second is, that if a party writes, or prepares a will under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.

These principles, to the extent that I have stated, are well established. The former is undisputed. The latter is laid down by Sir John Nicholl in substance in *Paske v. Ollatt*, (a) *Ingram v. Wyatt*, (b) and *Billinghurst v. Vickers*, (c) and is stated by that very learned and experienced judge to have been handed down to him by his predecessors: and this tribunal has sanctioned and acted upon it in a recent case, that of *Baker and Batt*.

Their lordships are fully sensible of the wisdom of this rule and the importance of its practical application on all occasions; at the same time their

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lordships think it fit to observe, especially as there has been some discussion upon this point, towards the close of this inquiry, that some of the expressions reported to have been used by Sir John Nicholl, in laying down this doctrine, appear to them to be somewhat equivocal and capable of leading into error in the investigation and decision of questions of this nature. It is said that where the party benefited prepares the will, "the presumption and *onus probandi* is against the instrument, and the proof must go not merely to the act of signing, but to the knowledge of the contents of the paper," (a) and that "where the capacity is doubtful there must be proof of *instructions, or reading over.*" (b) If, by these expressions, the learned judge meant merely to say, that there are cases of wills prepared by a legatee so pregnant with suspicion, that they ought to be pronounced against in the absence of evidence in support of them, and that extending to clear proof of the actual knowledge of the contents by the supposed testator; and that instructions proceeding from him, or the reading over the instrument by or to him, are the most satisfactory evidence of such knowledge, we fully concur in the propositions so understood, in all probability the learned judge intended no more than this. But if the words used are to be construed *strictly*; if it is intended to be stated as a rule of law, that in every case in which the party preparing the will derives a benefit under it, the *onus probandi* is shifted, and that not only a certain measure, but a particular species of proof is therefore required from the party propounding the will, we feel bound to say that we conceive the

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circumstance of suspicion, demanding the vigilant care and circumspection of the Court in investigating the case, and calling upon it not to grant probate without full and entire satisfaction that the instrument did express the real intentions of the deceased. Nor can it be necessary that, *in all such cases*, even if the testator's capacity is doubtful, the precise species of evidence of the deceased's knowledge of the will is to be in the shape of instructions for, or reading over the instrument. They form, no doubt, the *most* satisfactory, but they are not the *only* satisfactory description of proof by which the cognizance of the contents of the will may be brought home to the deceased. The Court would naturally look for such evidence; in some cases it might be impossible to establish a will without it, but it has no right in every case to require it.

I have said thus much upon the rules of law applicable to this case, with the concurrence of all their lordships who heard the argument, not particularly with a view to the decision of this case; but in order to prevent any misconception upon a subject of so great practical importance; at the same time their lordships wish it to be distinctly understood, that entirely acquiescing in the propriety of the rule so qualified and explained, they should be extremely sorry if anything which has fallen from them should have the effect of impeding its full operation.

The case which their lordships have now to decide has been argued at the bar with much industry and ability on both sides; and all their lordships have besides had an ample opportunity of perusing and considering with due care and atten-

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A tolerably just estimate may be formed of the character and mental powers of Mr. Barry the deceased, from the parol evidence on both sides, after making allowance for the bias under which the witnesses speak ; and the written documents which are proved by the handwriting of the deceased. From these sources it may be collected that he was a person of slender capacity, of a retired disposition, indolent habits, addicted to drinking, somewhat singular in his appearance, frivolous, and occasionally even childish in his amusements and occupations. On the other hand, it is clear that he was not insane, and although the evidence embraces a period of more than fifty years, and an account of most of the transactions of his life, there is no satisfactory evidence of a single act, denoting that he was labouring under delusions, or indicating such a degree of folly as to shew that he was unfit to be trusted with the management of his own con-

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That he should pass over his own relations is rendered highly probable under the unhappy circumstances of this case. If, all the other facts of the case being as they were, he had lived on terms of affectionate intercourse with his son ; had received him occasionally as an inmate of the house ; had habitually corresponded with him, and had always expressed for him parental regard, the case would have been one of much greater suspicion and more difficult to decide than it is ; but, unhappily, there is proof of estrangement from his only son,

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September, 1816, he had unfortunately quarrelled, and he kept up no intercourse with the other members of that family; under these circumstances, it is highly probable that he would make a will, in order to prevent his son enjoying his property, and that as none of his relations were on terms of friendship with him, he would bestow his bounty on those persons who were, and none seem to have been in habits of intercourse with him more than Mr. Percy and Mr. Butlin, and it is by no means improbable that he would give a part to an old servant, in whom he had reposed great confidence and trust. It is true that this confidence was in some respects misplaced, and Whitehead seems to have taken liberties in his master's house, which he could hardly have sanctioned, but it does not appear that his master knew it, and he was intrusted to the last with the management of his domestic affairs.

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In the first place, it is a fact beyond dispute that Mr. Percy, who prepared the will, at all events *meant* that it should be fairly and openly executed in the presence of respectable witnesses. Mr. Smith was certainly applied to by him for that purpose, and could not attend. Dr. Davidson and

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Mr. Chapman, all answering that description, did attend ; this circumstance is strong to prove the absence of clandestinity and fraud.

There were instructions for the burial and funeral in the handwriting of the testator—(Exhibit D.) These prove no more than that his mind was directed to the subject of arrangements after his death ; but they do not carry the case further ; they do not lead necessarily to the inference that he had a *will* in view ; but Exhibit C is proved by Gough (and there is no fair ground to disbelieve his evidence) to have been transmitted to the deceased. It incorporated the memorandum D, and was a draft of the will, and that draft, in a page of it which contains the legacies to Whitehead and his wife, is twice altered in the handwriting of the testator ; which distinctly proves that his mind was employed on the subject, and affords reasonable evidence that he was cognizant of the contents. In addition to this, Gough proves that it was Mr. Barry who sent him to desire Mr. Chapman “to come to see him execute his *will*.” He also sent him with the same message to Dr. Marsden, but that gentleman was not at home ; Dr. Davidson, who did attest it, expressly swears that Mr. Barry declared it to be his last will and testament, and requested him and Mr. Chapman to witness it, and he adds his belief that Mr. Barry was of perfectly sound mind, memory and understanding, and capable of doing any act requiring thought, judgment and reflection. It is suggested that there was some secrecy in the preparation of the will in Mr. Percy’s office, for Nightingale, who was an old clerk, did not know it, but we think that this does not raise any inference

of this kind, as it may naturally be accounted for, by the practice of entrusting different matters of business to different clerks, and if a fraud had been intended and concocted between the three legatees, it is rather more likely that Nightingale, who was an associate of Whitehead, should be employed than Gough, who was not.

We think, therefore, that the evidence of the factum, coupled with the strong probabilities of the case, is sufficient to remove the suspicions which naturally belong to the case of all wills prepared by persons in their own favour, especially when made by those of weak capacity. The undue influence and the importunity which, if they are to defeat a will, must be of the nature of fraud or duress, exercised on a mind in a state of debility, are insinuated, but not proved. Whitehead's authority and power over his master are no doubt sufficiently established, but that such authority and power were in any way exercised to procure this will to be made, is only conjecture, and there is nothing like proof of authority or control of any kind on the part of Butlin or Percy. We are therefore of opinion that the will is established, and ought to be admitted to proof. We have entertained some doubt as to the propriety of that part of the decree which condemns the Appellant in the costs subsequent to the giving in his allegation, dated the 7th of November, 1833 : the case is one in which the Appellant was well justified in calling for the proof of the will, and watching and sifting that proof, and certainly ought not to have had to pay the costs of that inquiry. But as the case made by his allegation was a charge in the nature of con-

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spiracy and fraud, and that charge has failed, and as a part of it, and that causing no small addition to the expense, is introduced for a collateral purpose, not material to the decision of this suit, we do not think we ought to vary the decree of the Court below in respect to the costs, and the appeal must be consequently dismissed, and we think with costs.

ARCHES COURT OF CANTERBURY.

BLUNT *and* FULLER *against* HARWOOD.

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In a suit for subtraction of a church-rate, made in virtue of the statutes 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134, the libel ought to shew upon the face of it that the conditions required by the acts have been complied with.

Libel to be reformed.

This was a question as to the admissibility of a libel in a suit for subtraction of church-rate, promoted by the Churchwardens of Streatham against Mr. Benjamin Harwood, a parishioner; the rate in question was made to repair the parish church, and to repay certain portions of a principal sum of 3,300*l.*, borrowed under the statutes 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134, and interest on a part of that sum.

The libel pleaded in substance :—

That, on Saturday, the 13th of February, 1836, and in pursuance of notice duly published, &c., on the 7th day of that month, the parishioners and inhabitants of the said parish, assembled in vestry, in the committee-room of the workhouse of the said parish, then and there resolved to make a

rate or assessment of one shilling in the pound on all the properties, &c., for the necessary repairs of the said parish church, and for other occasions belonging to the said church, and for and towards the repayment of such portions of the principal sum of 3,300*l.*, borrowed in or about the month of November, 1830, under the authority and pursuance of an act of Parliament, passed in the 58th of Geo. 3, intituled, "An Act for building and promoting the building of additional churches in populous parishes;" and also of another act, passed in the 59th of his said Majesty, intituled, "An Act to amend and render more effectual an act passed in the last session of Parliament, for building and promoting the building of additional churches in populous parishes;" for the enlargement, repair, and alteration of the church, as would become due in the year ending at Easter then next; such portions amounting to the sum of 165*l.*, being five per cent on the said principal sum of 3,300*l.*, and a half-year's interest at four per cent per annum on 2,475*l.*, being that part of the said principal of 3,300*l.*, as then remained due and unsatisfied, such half-year's interest amounting to the sum of 49*l.* 10*s.* That such rate was accordingly made and assessed on all such inhabitants, at one shilling in the pound for all such houses, lands, or tenements which they had occupied or enjoyed in the said parish, and was afterwards duly confirmed, &c.

The remainder of the libel was in the usual form.

Lushington, in objection to the libel.

The averments in the libel are not sufficiently.

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specific to put the party proceeded against in possession of the facts necessary for him to know whether he has a good defence or not. Suppose the libel to be admitted as it stands, still the money may not have been borrowed in conformity with the provisions of the acts of Parliament; and how is the party to shape his defensive plea? The libel, as it stands, is incapable of proof, or of being counterpleaded. But there are other objections. Application has been made to the vestry clerk, who has refused access to the books. Then assuming that the money was borrowed, and for the three purposes stated in the plea,—the enlargement, alteration, and repair of the church,—ought it to be left to the defendant to ascertain under what sections of two voluminous acts of Parliament this was done? Prior to these statutes it was illegal, under the general law, to borrow money on the credit of church-rates, at all; but under certain limitations, such power is now given, nevertheless most carefully guarded, in order to prevent abuse. It was found in some cases impossible, where the churches required to be enlarged, or where extensive repairs were wanted, to raise the money within a single year, and the statutes passed in the 58th and 59th of Geo. 3, give a certain power, the object of which is to spread the expense over a number of years, that would be too great for a single year; but these powers are given under certain conditions. By the 59th section of the 58th Geo. 3, c. 45, with regard to the *enlarging* or otherwise *extending the accommodation* in churches, a power is given to Churchwardens to raise money in a certain manner set forth in the act, with the consent of the *bishop*

and *incumbent*, and with the express proviso that “one half of the additional accommodation be allotted to uninclosed or free sittings,”—has not the defendant a right to know whether this was done, and whether, consequently, the funds were properly raised or not.

With respect to *repairs*, the stat. 59 Geo. 3, c. 134, sect. 14, gives certain powers, but under different conditions to those in the 58th Geo. 3, as to enlargement; for the 59th of Geo. 3, requires where money has been raised for *repairs*, that “a sum sufficient from time to time, to pay the interest of the money so borrowed, and not less than *ten per cent* of the principal, shall be raised, until the whole of the money borrowed shall be repaid,” and in *The King v. the Churchwardens of Dursley*, (a) the Court of King’s Bench decided that Churchwardens cannot raise a loan under this statute, on the credit of church-rates, to pay a debt for repairs incurred in a past year, but that the loan should be raised at the time when the repairs were done, and that the rates for the repayment should commence immediately, and be continued, so as to pay off the debt by ten annual instalments. Different considerations apply to money raised for enlarging of a church, and for repairing a church, and you cannot raise one and the same loan for the double purpose mentioned in the statutes; yet a sum has been borrowed for both purposes, and it is impossible to find from the libel how this has been done.

Nicholl, in support of the libel.

It is sufficient to aver that the money has been

(a) 5 Ad. and Ell. 10.

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borrowed in pursuance of the acts of parliament. The Court will assume, until the contrary be shown, that the rate is a legal one. If the other party has anything to allege in answer, he can do so by way of defence. On the face of the libel, and of the rate, there is nothing irregular.

THE COURT.

The difficulty under which the party proceeded against labours, is this, that he is called upon to prove a negative. You are in possession of the parish books, and can show that the money was borrowed in the manner pointed out by the acts of parliament. Suppose I were to admit the libel, and the defendant were to admit the facts, the rate may not be valid nevertheless.

Nicholl.—We plead that the money was borrowed in pursuance of the act of parliament.

THE COURT.

But not in pursuance of the conditions of the act. Until you plead that all the conditions of the act have been complied with, the Court cannot enforce the rate.

SIR HERBERT JENNER.

I am unwilling to throw out anything that might prejudice a particular case, but I must say, with reference to this case, that it lies with the party claiming payment of the rate to show that the Court can enforce it. The libel states that the money was borrowed “under the authority and in pursuance of the acts,” so that it is not a common-

law right ; and before the party can ask the Court to enforce payment of the rate, he must show that the requisites of the acts of parliament have been complied with. What are those requisites ? The money is stated to have been borrowed for three objects—the enlargement, repair, and alteration of the church ; taking enlargement to include alteration, the 58 Geo. 3, c. 45, sec. 59, requires the consent, not only of the vestry, but of the bishop and incumbent, to the borrowing upon the credit of the rates, such sums of money as shall be necessary for defraying the expense of “ enlarging or otherwise extending accommodation.” And it empowers Churchwardens “ to make rates for the payment of the interest of such sums of money so to be borrowed and raised, and for providing a fund of not less than the amount of the interest upon the sum advanced, for the repayment of the principal thereof, or for repaying such principal in such manner, and at such times, and in such proportions as shall be agreed upon with the persons advancing any such money, provided always that one half of the additional accommodation which shall be obtained by any such expenditure shall be allotted to uninclosed or free seats.” Is it not incumbent upon the Churchwardens to show that they have complied with these conditions ? It is quite impossible, unless they put themselves in such a position, that the Court can enforce the rate.

Again, with respect to repairs. The 58 Geo. 3, contains no provision for borrowing money for repairs ; but under the 14th section of the 59 Geo. 3, c. 134, Churchwardens are empowered to borrow money upon the credit of the rates, for defraying

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tion the immense mass of evidence, more or less material, which was adduced in the Court below : as the result of that consideration has been to satisfy our minds that the decree of the judge of the Prerogative Court was right, it is not necessary to go into the same minute statement or comment upon the evidence in the cause in detail, which we should have thought it our duty to have done if we had happened to arrive at a different conclusion from that of the learned judge. Adopting the principles above laid down and admitted on both sides, we are all quite satisfied that the deceased was competent, and that the paper propounded by the respondent is proved to be his true last will, and to express his real intentions.

A tolerably just estimate may be formed of the character and mental powers of Mr. Barry the deceased, from the parol evidence on both sides, after making allowance for the bias under which the witnesses speak ; and the written documents which are proved by the handwriting of the deceased. From these sources it may be collected that he was a person of slender capacity, of a retired disposition, indolent habits, addicted to drinking, somewhat singular in his appearance, frivolous, and occasionally even childish in his amusements and occupations. On the other hand, it is clear that he was not insane, and although the evidence embraces a period of more than fifty years, and an account of most of the transactions of his life, there is no satisfactory evidence of a single act, denoting that he was labouring under delusions, or indicating such a degree of folly as to shew that he was unfit to be trusted with the management of his own con-

cerns. Though certainly not a man of business, he was capable of transacting the ordinary affairs of life, and the letters produced, under his hand, and the parol evidence of the annual settlement of his accounts and attendance at the banker's, distinctly shew, that he paid considerable attention to his pecuniary concerns, and was competent to the conduct of his affairs. It is not indeed disputed on one side, but that he was of testable capacity, nor on the other that he was a person of weak mind ; as to the extent of that weakness, there is a difference, but admitting its existence, even to the degree represented on the part of the appellant, the only consequence will be, that it adds to the suspicion, which unquestionably belongs to the circumstance of the attorney who prepared the will, taking no less than a fourth of the estate, and the legatees taking the whole, to the exclusion of his own family, and calls upon us to watch the proof of the will itself with increased jealousy and suspicion. The question is, whether these grounds of suspicion have been satisfactorily removed, and the instrument proved to be the real will of the testator himself ?

That he should pass over his own relations is rendered highly probable under the unhappy circumstances of this case. If, all the other facts of the case being as they were, he had lived on terms of affectionate intercourse with his son ; had received him occasionally as an inmate of the house ; had habitually corresponded with him, and had always expressed for him parental regard, the case would have been one of much greater suspicion and more difficult to decide than it is ; but, unhappily, there is proof of estrangement from his only son,

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so clear and distinct, as to admit of no doubt, and upon grounds which, whether the charge against the son were true or false, cannot assuredly be deemed irrational. Though Mr. Barry Barry had been guilty of the violent conduct which is deposed to by some of the witnesses, and that operating on the timidity of his father might have sometimes excited his fears, it is clear from the correspondence, that his father was on a friendly footing with him, and professed much regard for him, even after that gentleman had absconded, to avoid being taken on a bench warrant founded upon the charge against him; but after the time that he declined to take his trial at the assizes in March, 1814, and thereby afforded a strong ground for believing that the charge was true, all intercourse ceased; the deceased never wrote to, or saw his son afterwards—he held no communication whatever with him, and in December, 1819, when in the absence of Whitehead and Butlin, under whose control the deceased is supposed to have been, Mr. Barry Barry went to his father's house, his father himself, of his own accord excluded him from his presence; and it appears to be clear, that from the month of March, 1814, he ceased to speak of him, except as an unfortunate and unhappy man. In this state of complete alienation from his son, it is by no means unnatural to suppose that he would not make him the object of his bounty, but that he would seek elsewhere for those on whom he would bestow it. After his daughter's death in 1821, he had no relations except the Neales, from them also it is equally clear that his regards, if he ever entertained any, were estranged. With Pendock, who died in

September, 1816, he had unfortunately quarrelled, and he kept up no intercourse with the other members of that family; under these circumstances, it is highly probable that he would make a will, in order to prevent his son enjoying his property, and that as none of his relations were on terms of friendship with him, he would bestow his bounty on those persons who were, and none seem to have been in habits of intercourse with him more than Mr. Percy and Mr. Butlin, and it is by no means improbable that he would give a part to an old servant, in whom he had reposed great confidence and trust. It is true that this confidence was in some respects misplaced, and Whitehead seems to have taken liberties in his master's house, which he could hardly have sanctioned, but it does not appear that his master knew it, and he was intrusted to the last with the management of his domestic affairs.

With these probabilities then in favour of the will propounded, let us look at the evidence of the factum, which, though not so strong as direct proof of written instructions, to the full extent of the will, or direct proof that it was read over, is still of a satisfactory nature, and with the other circumstances to which I have adverted, leaves the mind perfectly satisfied that the instrument expresses his real wishes.

In the first place, it is a fact beyond dispute that Mr. Percy, who prepared the will, at all events *meant* that it should be fairly and openly executed in the presence of respectable witnesses. Mr. Smith was certainly applied to by him for that purpose, and could not attend. Dr. Davidson and

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and incumbent as well as of the vestry; but there must be due notice of the object for which the vestry is held. The Vestry Act (a) requires that no vestry shall be held unless notice shall have been given, three days before, of the place, hour, and special purposes for which the vestry is called; the intention of which was to prevent any surprise on the parish, by doing, under cover of a notice, what was not within the terms of the notice. The question here, is, whether what was done at the vestry, on the 2nd of August, was not a necessary consequence of the special business for which that vestry was called? The libel pleads, that the population of Streatham having increased, and the church being insufficient, a vestry was held on the 17th of March, when a committee was appointed for the purpose of considering a plan for affording additional accommodation; that another vestry was held on the 2nd of August, when the committee presented their report, recommending a certain plan, which was adopted by the vestry, and the money borrowed by the Churchwardens. Now, the notice pleaded of this last vestry meeting is this: "to receive the report of the committee appointed to consider the plan produced to the vestry meeting, held on the 17th of March, for affording additional accommodation to the parishioners desirous of attending divine worship in the parish church." The plan was considered, and adopted, and the Churchwardens were authorized to borrow money under the act of parliament to carry it into execution. How much of the business done at this vestry is supposed to come within the meaning of this notice?

(a) 58 Geo. 3, c. 69.

Lushington. It was competent to the vestry to have approved of any plan before it, but it should have reserved the raising of money until a further notice was given.

THE COURT.

It appears to me, that, taking the two notices together, the vestry could confirm and adopt the report of the committee, and, as a necessary consequence, direct the plan to be carried into execution, and also resolve to borrow money, in order to carry it into execution : I think that the one was the consequence of the other, and that it was not necessary to call another meeting to carry the plan into execution. Undoubtedly the borrowing of money is a very important part of the functions which a vestry is authorized to exercise ; but it is one without the exercise of which the church could not have been enlarged. It is impossible that the vestry could have taken any undue advantage of the act, or that any person in the parish could have been misled, or that the money could have been raised in any other way.

Lushington.—My objection is, that in order to borrow money, there must be a special notice that money was to be raised.

THE COURT.

Unless cases can be pointed out in which it has been held that there must be a special notice for borrowing money, I shall consider the notice in this case sufficient to cover the business done at this vestry. It was of no use to appoint a committee to

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prepare and propose a plan for another vestry, unless the second vestry had the means of carrying the plan into execution; and the second vestry having met for that purpose, and having approved of the plan, resolved that the report of the committee should be confirmed, and that the plan should be carried into execution. It appears to me that the second vestry did not go further than the first empowered them to do; that they did not exceed the authority they had by directing the Churchwardens to borrow money on the security of the church rates. It would be straining the acts of parliament to say that no money could be borrowed, unless a special notice were given that money was to be raised.

If the notice is proved to the extent stated in the libel, I shall be of opinion that the money was fairly borrowed, and that the rate made for the payment of the interest, and part of the principal sum is a legal rate; I therefore admit the libel as reformed.

The question as to the sufficiency of the notice in this case was brought before the Court of Queen's Bench; a rule having been granted by that Court on the 21st of April, 1838, to show cause why prohibition should not issue to the Arches Court, on the ground of the notice being insufficient, under the statute 58 Geo. 3, c. 69, s. 1. The point came on for argument on the 12th of June, 1838, but in the mean time the original notice itself had been found, which was as follows:—

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“ Notice is hereby given, that a vestry will be held in the vestry-room of this parish on Monday, the 2nd day of August, at nine o’clock precisely, to receive a report from the church committee, *and to adopt such measures as may appear necessary for carrying that report into execution*; and further, that it is intended that such vestry do adjourn to the workhouse of this parish, there to transact the business of the day.” And the Court (a) being of opinion that this was a sufficient notice, discharged the rule nisi for a prohibition, upon the understanding that the libel should be reformed by pleading the real notice.

Additional articles were afterwards brought in and admitted in the Arches Court, pleading the notice above set forth, upon which the party proceeded against no longer opposed the rate, whereupon the Judge pronounced for the rate, but without costs.

1838.

BYE DAY
TRINITY TERM.
29th June.

It would seem that unless the notice itself had been discovered, that a prohibition would have issued. (See the case reported in 8 Ad. & Ell. p. 610.)

(a) Lord Denman, C. J., Littledale, Patteson, and Williams, Js.

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specific to put the party proceeded against in possession of the facts necessary for him to know whether he has a good defence or not. Suppose the libel to be admitted as it stands, still the money may not have been borrowed in conformity with the provisions of the acts of Parliament; and how is the party to shape his defensive plea? The libel, as it stands, is incapable of proof, or of being counterpleaded. But there are other objections. Application has been made to the vestry clerk, who has refused access to the books. Then assuming that the money was borrowed, and for the three purposes stated in the plea,—the enlargement, alteration, and repair of the church,—ought it to be left to the defendant to ascertain under what sections of two voluminous acts of Parliament this was done? Prior to these statutes it was illegal, under the general law, to borrow money on the credit of church-rates, at all; but under certain limitations, such power is now given, nevertheless most carefully guarded, in order to prevent abuse. It was found in some cases impossible, where the churches required to be enlarged, or where extensive repairs were wanted, to raise the money within a single year, and the statutes passed in the 58th and 59th of Geo. 3, give a certain power, the object of which is to spread the expense over a number of years that would be too great for a single year; but these powers are given under certain conditions. By the 59th section of the 58th Geo. 3, c. 45, with regard to the *enlarging* or otherwise *extending the accommodation* in churches, a power is given to Churchwardens to raise money in a certain manner set forth in the act, with the consent of the *bishop*

and *incumbent*, and with the express proviso that “one half of the additional accommodation be allotted to uninclosed or free sittings,”—has not the defendant a right to know whether this was done, and whether, consequently, the funds were properly raised or not.

With respect to *repairs*, the stat. 59 Geo. 3, c. 134, sect. 14, gives certain powers, but under different conditions to those in the 58th Geo. 3, as to enlargement; for the 59th of Geo. 3, requires where money has been raised for *repairs*, that “a sum sufficient from time to time, to pay the interest of the money so borrowed, and not less than *ten per cent* of the principal, shall be raised, until the whole of the money borrowed shall be repaid,” and in *The King v. the Churchwardens of Dursley*, (a) the Court of King’s Bench decided that Churchwardens cannot raise a loan under this statute, on the credit of church-rates, to pay a debt for repairs incurred in a past year, but that the loan should be raised at the time when the repairs were done, and that the rates for the repayment should commence immediately, and be continued, so as to pay off the debt by ten annual instalments. Different considerations apply to money raised for enlarging of a church, and for repairing a church, and you cannot raise one and the same loan for the double purpose mentioned in the statutes; yet a sum has been borrowed for both purposes, and it is impossible to find from the libel how this has been done.

Nicholl, in support of the libel.

It is sufficient to aver that the money has been

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THE COURT.

The difficulty under which the party proceeded against labours, is this, that he is called upon to prove a negative. You are in possession of the parish books, and can show that the money was borrowed in the manner pointed out by the acts of parliament. Suppose I were to admit the libel, and the defendant were to admit the facts, the rate may not be valid nevertheless.

Nicholl.—We plead that the money was borrowed in pursuance of the act of parliament.

THE COURT.

But not in pursuance of the conditions of the act. Until you plead that all the conditions of the act have been complied with, the Court cannot enforce the rate.

SIR HERBERT JENNER.

I am unwilling to throw out anything that might prejudice a particular case, but I must say, with reference to this case, that it lies with the party claiming payment of the rate to show that the Court can enforce it. The libel states that the money was borrowed “under the authority and in pursuance of the acts,” so that it is not a common-

law right ; and before the party can ask the Court to enforce payment of the rate, he must show that the requisites of the acts of parliament have been complied with. What are those requisites ? The money is stated to have been borrowed for three objects—the enlargement, repair, and alteration of the church ; taking enlargement to include alteration, the 58 Geo. 3, c. 45, sec. 59, requires the consent, not only of the vestry, but of the bishop and incumbent, to the borrowing upon the credit of the rates, such sums of money as shall be necessary for defraying the expense of “ enlarging or otherwise extending accommodation.” And it empowers Churchwardens “ to make rates for the payment of the interest of such sums of money so to be borrowed and raised, and for providing a fund of not less than the amount of the interest upon the sum advanced, for the repayment of the principal thereof, or for repaying such principal in such manner, and at such times, and in such proportions as shall be agreed upon with the persons advancing any such money, provided always that one half of the additional accommodation which shall be obtained by any such expenditure shall be allotted to uninclosed or free seats.” Is it not incumbent upon the Churchwardens to show that they have complied with these conditions ? It is quite impossible, unless they put themselves in such a position, that the Court can enforce the rate.

Again, with respect to repairs. The 58 Geo. 3, contains no provision for borrowing money for repairs ; but under the 14th section of the 59 Geo. 3, c. 134, Churchwardens are empowered to borrow money upon the credit of the rates, for defraying

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the expense of repairs, with the consent of the vestry, the bishop, and the incumbent; and they are empowered and required in such cases "to raise by rate, a sum sufficient from time to time, to pay the interest of the money so borrowed, and not less than ten per cent. of the principal sum borrowed out of the produce of such rates, until the whole of the money so borrowed shall be repaid." They are required to raise a fund for the repayment of the principal sum, for this reason, that the repairs of the church lie on the present inhabitants; whereas the expense of enlargement falls likewise on future inhabitants. Unless the Churchwardens bring themselves within these provisions they are not able to sue for the rate, and I cannot see how the Court could enforce payment of this demand, unless it be satisfied by legal proof that the money was borrowed in compliance with the conditions of these two sections of the acts of parliament. The Churchwardens have the power of proving the affirmative, if it can be proved; whereas the other party is to prove a negative, that the Churchwardens had not obtained the consent of the bishop and the incumbent, and that they have not allotted the required number of free seats. How is the party who has not access to the books to prove a negative? and is it not for the Churchwardens to show that they have complied with the acts of parliament?

I am of opinion that the libel must be reformed.

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3rd Session.

BLUNT
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The libel, as reformed, with additional Articles, came on for admission this day (a further alteration having been directed to be made by the Court on the 11th January last), pleading,

“ That the population of Streatham having increased, and the church being insufficient to accommodate the parishioners, at a vestry, held on the 17th of March, 1830, in pursuance of notice published on Sunday, the *7th of that month*, a committee was appointed to consider a plan then produced to the vestry, and to report whether it would be expedient to adopt that or any other plan for affording additional accommodation to the parishioners desirous of attending divine worship in the said church. That at another vestry, held on the 2nd August, 1830, in pursuance of notice published, &c., on *25th July*, the committee presented their report, recommending an enlargement of the church, agreeable to certain plans submitted by Joseph Parkinson, at an expense not exceeding 3,300*l.*; and that it was resolved that such report should be adopted, and the plans carried into execution, provided proper persons could be found to give security to carry the same into effect, at a sum not exceeding 3,300*l.*; that the Churchwardens and Rector be authorized to carry the plans into execution, and the Churchwardens be authorized to borrow the sum of 3,300*l.* at a rate not exceeding 4*l.* per cent. per annum, on

A vestry meeting having been held on the 17th of March, at which a committee was appointed to consider a plan then produced for affording additional accommodation to the parishioners in the church, and to report whether it would be expedient to adopt that or any other plan. At a subsequent vestry it was resolved to adopt the report of the committee, and to borrow 3,300*l.* on the security of the church rates, in order to carry the plan into effect.

Quere, whether the latter vestry had the power of borrowing the money, the notice pleaded of the vestry being “ to receive the report of the committee appointed to consider the plans

produced to the vestry meeting, held on the 17th of March, for affording additional accommodation to the parishioners desirous of attending divine worship in the parish church.”

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the security of the church rates." It went on to plead, that the conditions of the stat. 58 Geo. 3, c. 45, had been complied with, setting forth the particulars, and that the money had been borrowed, &c.

It further pleaded, that the notice published on the 7th March declared that a meeting was to be held in the Vestry Room of the said parish, on the 17th of that month, at nine o'clock in the morning, for the purpose of considering a plan which would then be produced by the Churchwardens of the said parish, for affording additional accommodation to the parishioners desirous of attending divine worship in the said church, or to that effect; and that the notice published on the 25th of July, declared, "that a vestry was to be held in the Vestry Room of the said parish, on the second day of August then next, at nine o'clock in the forenoon, *to receive the report of the committee appointed to consider the plan produced to the vestry meeting, held on the said 17th day of March, for affording additional accommodation to the parishioners desirous of attending divine worship in the said parish church, or to that effect;*" and that such notices had been lost or so mislaid that they could not be found, though diligent searches had been made for them.

Lushington objected to the sufficiency of the notice for the second vestry, when the rate was made for borrowing the money.

The notice pleaded is nothing more than a notice of considering a plan to be produced, of which the parishioners were ignorant: all that could properly be done under this notice was to receive the plan

and consider the propriety of adopting it, but the Churchwardens proceeded to borrow the money; this was clearly beyond the terms of the notice, and the money was therefore borrowed on no legal security, and the rate made to repay the money so borrowed, was consequently bad.

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The Queen's Advocate, in support of the libel.

It is not denied that due notice was given of the first meeting, and the second notice was to consider the plan proposed to the first meeting, and although there is no direct mention of borrowing money, it was clear that money must be raised. The party opposing the rate was present at the meeting—the consent of the bishop and incumbent has been obtained, and the borrowing of money must be considered as comprised within the object mentioned in the notice. The parishioners could not have been taken by surprise.

SIR HERBERT JENNER.

The only question now before the Court appears to be this, whether the notice given for the vestry of the 2nd of August, 1830, was such as authorized the Churchwardens to borrow money on the credit of the church rates, to be applied to the enlargement of the parish church, for the accommodation of the parishioners.

It is true that, before the Church Building Acts, there was no power in a vestry of a parish to borrow money on the security of the rates by the common law, and where money was so borrowed, it was done without any legal security. But the Church Building Acts empower Churchwardens to raise money in this way, with the consent of the bishop

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and incumbent as well as of the vestry; but there must be due notice of the object for which the vestry is held. The Vestry Act (a) requires that no vestry shall be held unless notice shall have been given, three days before, of the place, hour, and special purposes for which the vestry is called; the intention of which was to prevent any surprise on the parish, by doing, under cover of a notice, what was not within the terms of the notice. The question here, is, whether what was done at the vestry, on the 2nd of August, was not a necessary consequence of the special business for which that vestry was called? The libel pleads, that the population of Streatham having increased, and the church being insufficient, a vestry was held on the 17th of March, when a committee was appointed for the purpose of considering a plan for affording additional accommodation; that another vestry was held on the 2nd of August, when the committee presented their report, recommending a certain plan, which was adopted by the vestry, and the money borrowed by the Churchwardens. Now, the notice pleaded of this last vestry meeting is this: "to receive the report of the committee appointed to consider the plan produced to the vestry meeting, held on the 17th of March, for affording additional accommodation to the parishioners desirous of attending divine worship in the parish church." The plan was considered, and adopted, and the Churchwardens were authorized to borrow money under the act of parliament to carry it into execution. How much of the business done at this vestry is supposed to come within the meaning of this notice?

(a) 58 Geo. 3, c. 69.

Lushington. It was competent to the vestry to have approved of any plan before it, but it should have reserved the raising of money until a further notice was given.

THE COURT.

It appears to me, that, taking the two notices together, the vestry could confirm and adopt the report of the committee, and, as a necessary consequence, direct the plan to be carried into execution, and also resolve to borrow money, in order to carry it into execution : I think that the one was the consequence of the other, and that it was not necessary to call another meeting to carry the plan into execution. Undoubtedly the borrowing of money is a very important part of the functions which a vestry is authorized to exercise ; but it is one without the exercise of which the church could not have been enlarged. It is impossible that the vestry could have taken any undue advantage of the act, or that any person in the parish could have been misled, or that the money could have been raised in any other way.

Lushington.—My objection is, that in order to borrow money, there must be a special notice that money was to be raised.

THE COURT.

Unless cases can be pointed out in which it has been held that there must be a special notice for borrowing money, I shall consider the notice in this case sufficient to cover the business done at this vestry. It was of no use to appoint a committee to

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prepare and propose a plan for another vestry, unless the second vestry had the means of carrying the plan into execution ; and the second vestry having met for that purpose, and having approved of the plan, resolved that the report of the committee should be confirmed, and that the plan should be carried into execution. It appears to me that the second vestry did not go further than the first empowered them to do ; that they did not exceed the authority they had by directing the Churchwardens to borrow money on the security of the church rates. It would be straining the acts of parliament to say that no money could be borrowed, unless a special notice were given that money was to be raised.

If the notice is proved to the extent stated in the libel, I shall be of opinion that the money was fairly borrowed, and that the rate made for the payment of the interest, and part of the principal sum is a legal rate ; I therefore admit the libel as reformed.

The question as to the sufficiency of the notice in this case was brought before the Court of Queen's Bench ; a rule having been granted by that Court on the 21st of April, 1838, to show cause why prohibition should not issue to the Arches Court, on the ground of the notice being insufficient, under the statute 58 Geo. 3, c. 69, s. 1. The point came on for argument on the 12th of June, 1838, but in the mean time the original notice itself had been found, which was as follows :—

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Streatham, 24th July, 1830.

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“ Notice is hereby given, that a vestry will be held in the vestry-room of this parish on Monday, the 2nd day of August, at nine o'clock precisely, to receive a report from the church committee, *and to adopt such measures as may appear necessary for carrying that report into execution*; and further, that it is intended that such vestry do adjourn to the workhouse of this parish, there to transact the business of the day.” And the Court (a) being of opinion that this was a sufficient notice, discharged the rule nisi for a prohibition, upon the understanding that the libel should be reformed by pleading the real notice.

Additional articles were afterwards brought in and admitted in the Arches Court, pleading the notice above set forth, upon which the party proceeded against no longer opposed the rate, whereupon the Judge pronounced for the rate, but without costs.

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BYE DAY
TRINITY TERM.
29th June.

It would seem that unless the notice itself had been discovered, that a prohibition would have issued. (See the case reported in 8 Ad. & Ell. p. 610.)

(a) Lord Denman, C. J., Littledale, Patteson, and Williams, Js.

**WRIGHT *against* ELWOOD, falsely calling herself
WRIGHT.**

1837.

**MICHAELMAS
TERM,
Nov. 8th.
2nd Session.**

Nullity of
marriage.

Marriage
without due
publication of
banns not void
under stat. 4
Geo. 4, c. 76,
unless both
parties cogni-
zant of the
undue publica-
tion.

Semble, that
a marriage
without any
publication of
banns, would
be held to be
without *due*
publication of
banns under
sect. 22 of
4 Geo. 4, c. 76.

4

This was a suit of nullity of marriage, promoted by Mr. James Dennis Wright against Amelia, otherwise Emily, alleged to have been the wife, and now the widow of Mr. Harlow Elwood, by reason of undue publication of banns, under the statute 4 Geo. 4, c. 76. The suit was brought by letters of request from the commissary of the Bishop of Winchester, for the parts of Surrey within that diocese.

The libel pleaded the marriage in Ireland, in 1821, of Mr. Harlow Elwood and Emily Elwood, then Dames, spinster, by virtue of a license from the Bishop of Killaloe. The libel went on to plead, that Mr. and Mrs. Elwood cohabited together until 1823, when Mrs. Elwood separated from her husband; that in a deed of settlement, (which was exhibited,) dated 10th September, 1822, she is described as "Emily Elwood," and that in proceedings in the Court of Chancery, in Ireland, against Mr. and Mrs. Elwood, the latter is designated as "Emily:" that she became acquainted in London with Mr. Wright, to whom she represented herself as "Emily Elwood, spinster," and as free from matrimonial contracts and engagements, and that she was addressed by the christian name of "Emily," and no other, as well by Mr. Wright (until her subsequent assumption of the name of "Emma,") as by others; and that Mr. Wright paid his addresses to her; that she having repre-

sented to Mr. Wright that she was a minor, and that her friends and guardian would not consent to her marriage, they agreed to effect a marriage by banns, and that she should assume the christian name of "Emma," which was done: that Mr. Wright caused the banns between himself and "Emma Elwood, spinster," to be published on the 28th of May, 4th of June, and 11th of June, 1826, and that on the 6th July following they were married, at the parish church of St. John's, Westminster: that Mr. Elwood was living at the time when the banns were published, and that he died on the 27th of June, before the marriage *de facto* took place; that the parties cohabited till 1828, when Mr. Wright discovering that she was a married woman at the time of his contract with her, separated from her, and had not since cohabited with her.

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Phillimore and *Haggard*, for Mr. Wright, contended that this marriage was null and void on two grounds.

First, because at the time of the publication of the banns the lady was a married woman; that the publication of the banns, therefore, was no publication, and consequently that the marriage was invalid.

Secondly, That the parties had "knowingly and wilfully intermarried without *due* publication of banns," and that the marriage was void under the 22nd section of the statute, 4 Geo. 4, c. 76.

Addams, contra.

This is not such an undue publication as would

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render the marriage void; the names Amelia, Emilia, Emily, and Emma, may be considered the same name; but supposing there was an undue publication, still this is a good marriage, it is Mr. Wright's own case that he was deceived by this lady, who, in 1826, was upwards of thirty years of age, yet made him believe that she was a minor of seventeen; as far as he knew, it was a due publication, and unless the undue publication be made knowingly and wilfully by both parties, according to the principle of this Court and of the Judicial Committee of the Privy Council, in the case of *Tongue v. Allen*, (a) and of the Court of King's Bench, (b) this is a valid marriage.

JUDGMENT,

SIR HERBERT JENNER.

Nov. 24th.
4th Session.

This is a suit of nullity of marriage by Mr. James Dennis Wright, of the parish of St. Pancras, Middlesex, against Amelia, otherwise Emily Elwood, described as of the parish of St. Mary, Lambeth, in the county of Surrey, and diocese of Winchester, and it is brought by letters of request from the commissary of the Lord Bishop of Winchester for the parts of Surrey.

The marriage sought to be set aside, was solemnized in the parish church of St. John the Evangelist, Westminster, on the 6th July, 1826, in virtue of banns published in that church, on the 28th May, the 4th June, and 11th June preceding, the banns having been published in the names of "John Dennis Wright, bachelor, and Emma Elwood,

(a) See page 38 of this volume, and 1 Moore's P. C. Cases, p. 90.

(b) *The King v. Inhabitants of Wroxton*, 4 Barn. and Adol. 640.

spinster," and their names so appear in the register of marriages.

It is contended that the marriage is null and void on two grounds ; first, because it was celebrated without any publication of banns at all, for, at the time of the publication of the banns, the person described as "Emma Elwood, spinster," was not entitled to that description, inasmuch as she had been married in 1821, to a person of the name of Harlow Elwood, who did not die until the 27th of June, 1826, that is, after the last publication of banns, which was on the 11th June ; secondly, because the marriage was solemnized without due publication of banns, as required by the act 4 Geo. 4, c. 76.

The citation was returned into Court on the Fourth Session of Michaelmas Term, 1836 ; an appearance was given ; the libel was brought in and its admission was debated, and several reformations and corrections were directed by the Court, which were made accordingly, and the libel was admitted as reformed. Several witnesses have been examined upon the libel, (some of them in Ireland, where the first marriage took place ;) but no interrogatories have been addressed to any of the witnesses, nor has any plea been given in on behalf of the other party, in the way of defence ; so that the Court has nothing before it, but the evidence in chief of the witnesses examined in support of the libel, and the Exhibits annexed thereto : although it has had the benefit of the assistance of the learned counsel for the party cited, both on the admission of the libel and on the hearing of the case, for which the Court has to express its obligation.

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Now, it is hardly necessary to observe, that, in all cases of this description, it is the duty of the Court to be extremely cautious in pronouncing a marriage, solemnized between two parties, null and void, and to examine the whole of the evidence produced in proof of the nullity with great vigilance and jealousy ; because, in these cases, opportunities are offered to parties to practise fraud and collusion ; and this is the more necessary, where the party, whose interests are apparently affected, and whose object it is to uphold the marriage endeavoured to be set aside, seems to have afforded every facility to the other party. Where the party before the Court, whose interests are affected, abandons his cause, the Court would be inclined to withhold its interposition for the protection of such a party ; but where, as in this case, the interests of third parties and of the public are concerned, it is a duty incumbent on the Court to be upon its guard against surprise.

If this is the duty of the Court generally, it is still more so in the present case, when the circumstances of the case are considered ; for this is the third attempt to obtain a sentence of nullity of marriage, the two preceding attempts having failed. The first suit was instituted in 1829, in the Consistory Court of London, (a) for the purpose of having the marriage declared void on account of the former marriage of the party, that is, on the ground that the marriage in question was solemnized during the life time of Mr. Elwood, the first husband ; but it turned out, on the proof, that, at

(a) 2 Hagg. Ecc. Rep. 598.

the time of the solemnization of the second marriage, Mr. Elwood was not alive, for it appeared in evidence, that the solemnization of the marriage took place on the 6th July, 1826, and Mr. Elwood had died on the 27th of June preceding; and therefore the Court was of opinion that it could not pronounce the marriage void, on the ground that it was celebrated during the life of the former husband, though the banns were published before he died.

The second attempt was made in the same Court in 1835, (a) after the lapse of six years from the former sentence; and at that time the ground alleged for setting aside the marriage was, that there had been an undue publication of banns, inasmuch as the husband was alive during the time the banns were published. In neither of these cases was it alleged that the name of "Emma" had been assumed for the purpose of the marriage, but simply that, at the end of the year 1825, Amelia Elwood assumed the name of "Emma," and gave herself out as a spinster, and that Mr. Wright, believing her to be so, paid his addresses to her; that the banns were published in the name of "James Dennis Wright" and "Emma Elwood," and that a marriage was solemnized between them: but it was not suggested that he knew her by any other name than that of "Emma." The learned judge of the Consistory Court was of opinion, that if there was nothing to shew that Mr. Wright had any knowledge of the existence of the former husband, at the time of the publication of the banns, the marriage

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was not void under the 4 Geo. 4, c. 76, and he rejected the libel. There was no appeal from this decision ; but, shortly after, a citation was taken out in another jurisdiction, the party residing in the diocese of Winchester ; and the suit was brought here by letters of request.

Now in the libel brought in and admitted in this cause, it is for the first time alleged that the name of " Emma " was assumed for the very purpose of this marriage, and assumed with the knowledge and consent of Mr. Wright, and the object for which it is alleged to have been assumed with the knowledge and consent of Mr. Wright was, that this lady, who represented herself to be a minor, could not obtain the consent of her guardian to the marriage, and therefore it was for the purpose of solemnizing the marriage without his knowledge, that Mr. Wright and herself agreed that she should assume the name of " Emma," instead of " Amelia " or " Emily." This circumstance aroused the vigilance of the Court, and when the admission of the libel came on for discussion, the Court intimated plainly and explicitly to the counsel for Mr. Wright, that it would expect full and satisfactory evidence of all the circumstances pleaded in the libel ; and accordingly, if it should turn out that Mr. Wright has failed in adducing such evidence, it will not be for want of timely notice of what was expected from him.

The question then is, what is the effect of the evidence produced ? With respect to some parts of the evidence produced to prove the former marriage in Ireland, in October 1821, the time when Mr. Elwood died, and also the times of the publication of banns of the second marriage,

without examining very minutely the evidence on the two first points, namely, the marriage in Ireland, and the death of Mr. Elwood,—the Court will assume that the marriage in Ireland is sufficiently established, (and I think there is no doubt that it was a valid marriage in Ireland,) and I am of opinion, on the evidence, that Mr. Elwood died on the 27th June, 1836, and that the third publication of the banns for the second marriage took place on the 11th of that month: so that there is no doubt that the first husband was alive during the time of the publication of the banns. Giving the party, therefore, the full benefit of the facts, the Court then proceeds to consider the law applicable to this state of facts.

Now, it has been maintained, that the publication of banns of a woman who is already married and whose husband is alive, is a mere nullity; that it is not properly an *undue* publication of banns, but it is *no publication at all*, and that it would be contrary to the policy of the law if the Court were to uphold a marriage not preceded by any publication of banns, nor by a license; and it has been also stated that such was the case, even before the passing of the first Marriage Act, 26 Geo. 2, c. 33, in 1754. But I confess I do not feel very strongly the force of that argument: for, as far as I can understand the principle upon which marriages are made null and void, on these grounds, under the act, it is that where false names are used intentionally, with a view of deceiving the public, it is no publication at all. So that in the case of the publication of false names, the publication is a mere nullity. In

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Pouget v. Tomkins, (a) Lord Stowell said: "The clear intention of the act is, that the true names of the parties should be published, and if they are not so published, it is no publication: no notice is given, and no opportunity is afforded to any one to allege an impediment. It has been constantly held, therefore, since the case of *Early v. Stevens*," which was in 1785, and I believe the earliest case under the Marriage Act,—“that a publication in false names is no publication.” And on no other principle could such a case have been brought under the provisions of that act, where the terms made use of, are, “without publication of banns;” it does not speak of “undue publication;” but that statute required that a marriage should be preceded by publication of banns, or by license. It seems to me, that a marriage was void under that statute only where there had been no publication—undue publication was not sufficient, unless it amounted to the absence of all publication.

This was the state of the law under the 26 Geo. 2, c. 33. Before that statute, marriages, without publication of banns or any religious ceremony,—contracts *per verba de præsenti*,—might be good and valid, though irregular: the parties and the minister might be liable to punishment, but the *vinculum matrimonii* was not affected. After the passing of the act 26 Geo. 2, c. 33, marriages were placed on a different footing as to banns and licenses; a certain degree of regularity was essential to the validity of the marriage contract, and marriages not preceded by banns or license, were null and void. In

(a) 2 Cons. Rep. 146.

that act, however, there was no provision for the protection of innocent parties, and many cases are in the recollection of the Court in which it had produced very injurious consequences. Parties even guilty of actual fraud, have obtained a separation without the possibility of doing justice to the party not cognizant of the fraud.

This state of things continued many years, but at length the legislature interfered to prevent the mischievous effects resulting from the provisions of this act, and to soften the rigour of the existing law.

I pass by the act 3 Geo. 4, which existed but for a short time, and I proceed to the act 4 Geo. 4, c. 76, which was in force at the time of this marriage, and is the law which is applicable to it.

This act begins by repealing all the former acts then in force. Part of the act 26 Geo. 2 had been repealed by the act 3 Geo. 4, but still part remained in force, and the remainder of that act, as well as the 3 Geo. 4, was repealed : so that, at that time, if the legislature had done no more, the common law and general law, as it existed before the Marriage Act of 1754, would have been restored, and a marriage would have been good and valid without any publication of banns or license. But the legislature did not stop here ; it went further, and declared, in the 22nd section, that where parties shall intermarry, knowingly and wilfully, without due publication of banns or license, the marriage shall be null and void. It has not adopted the terms of the former act, declaring that marriages shall not be solemnized "without publication of banns;" but the legislature has said : "If any persons shall,

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knowingly and wilfully intermarry without due publication of banns, or license from a person or persons having authority to grant the same, first had and obtained, the marriages of such persons shall be null and void to all intents and purposes whatsoever:" thereby, as I have stated, softening the rigour of the former law under the 26 Geo. 2. And according to the construction put upon this section by the Consistory Court of London, (a) by this Court, during the time of my predecessor, (b) as well as in my own time, (c) by the Court of King's Bench, (d) and I think I might say by the Judicial Committee of the Privy Council, (e) (though, perhaps, the point has not received an actual and direct decision of the latter tribunal), where the parties are not both cognizant of the false name, the marriage cannot be declared void. It is necessary that both parties should be accessory to the fraud; the act of one will not operate to the prejudice of the other, unless a participator.

The question then is, as the act speaks of marriages "without due publication of banns," what is the consequence where there is no publication of banns? for, according to Lord Stowell, in the case to which I have adverted, the publication of banns, in a false name, is equivalent to no publication. The Court can see no difference between the cases, which stand precisely on the same grounds; nor does there seem a reason why there should be a

(a) *Wiltshire v. Prince*, 3 Hagg. Ecc. Rep. 332.

(b) *Hadley v. Reynolds*, not reported.

(c) *Togue v. Allen*, *ante*, p. 38.

(d) *The King v. the Inhabitants of Wroxton*, 4 B. & Ad. 640.

(e) *Tongue v. Tongue*, 1 Moore's P. C. Cases, p. 90.

difference ; the fraud is the same in both ; the remedy is the same in both.

It is, however, contended that the words, “ without due publication of banns,” used in the statute 4 Geo. 4, c. 76, do not extend to cases of marriage not preceded by any publication of banns, as there are no words in the act to that effect ; but if that were so, the former Marriage Act being repealed altogether, upon its repeal, the general law was revived and came into operation, and continues to be in operation, except so far as it is qualified and restrained by the 4 Geo. 4, c. 76, the only act now in operation ; and unless this act extends to cases of marriage not preceded by any publication of banns, as distinguished from undue publication, a marriage, where a false name was used, would be a good and valid marriage. But I have no doubt that a marriage, which has not been preceded by any publication of banns at all, is a marriage within the meaning of the terms,—that is, a marriage without due publication of banns. Marriages without due publication of banns, are declared null and void, and I should be glad to know how it is possible that that can be a *due* publication of banns, which is *no* publication at all, and how it can be contended, with any effect, that marriages, where the publication of banns is a mere nullity, can be distinguished from marriages without a due publication of banns.

Then the question arises, whether Mr. Wright was cognizant of the fraud pleaded, with respect to the publication of the banns ; for it is not suggested at all that he was aware of the existence of the husband ; nay, in the other cases, he set up that he was deceived altogether ; that this lady represented

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herself as a spinster and a minor, and it is only here that he has alleged the publication of the banns under a false name, to deceive her guardian: if she had been of full age, there would have been no necessity for such imposition. There is no evidence to satisfy the Court that there was any imposition practised by Mr. Wright, or that he was cognizant of any necessity that a fraud should be practised. I am clearly of opinion that, on that part of the case, the proof on the part of Mr. Wright has failed, there being nothing to shew that, at the time of the publication of the banns, he knew the husband of this lady was in existence.

This brings me to the consideration of the other objection, on which it is contended that the marriage is void, that is, that a name was used in the publication of the banns, to which the female party was not entitled; that the name of "Emma" was substituted for "Amelia" or "Emily." It is not denied that, to annul a marriage on this ground, there must be a guilty knowledge by both the parties; and, accordingly, it is pleaded in the libel, in this case, that the name of "Emma" was assumed with the knowledge and consent of both parties, in order to deceive the guardian of a minor person,—for, I have already stated that this lady represented herself to be a minor and spinster. In neither of the former suits was such fact alleged, and I must say that the circumstance of its having found its way into this plea, for the first time, does not make a very favourable impression on the mind of the Court. This gentleman's averment is true or false; if true, how happens it that it should have been brought forward only at this late period of his pro-

ceedings? If false, he has been guilty of a gross attempt to practise a fraud upon the Court, and with his eyes open ; for the Court cautioned him and warned him of its suspicions, as the circumstances of the case authorized it to do ; and I must say, that the evidence brought forward in the cause, is not at all calculated to remove the unfavourable opinion which the Court originally entertained of the case.

It is not necessary that I should enter into this part of the case minutely. I shall not consider whether the change of "Emma" for "Amelia" or "Emily," is such as is calculated to produce a sufficient disguise of the identity of the party ;—whether it was calculated to deceive any person interested in the prevention of the marriage. I will assume that Mrs. Elwood took the name of "Emma," for the purpose alleged, and that "Amelia" or "Emily," was the name to which she was entitled. But I cannot find any evidence, or anything in the shape of evidence, which brings the knowledge of the fact home to Mr. Wright, though it is expressly pleaded that the name was assumed with his knowledge and consent. Mr. Wright undertook to prove that fact, for he was warned of the necessity of doing so, on the debate as to the admission of the libel. The only evidence which the Court can find, with reference to a guilty knowledge by Mr. Wright, as to the substitution of the name of "Emma," is, that one of the witnesses states that she was acquainted with Mr. Wright and Mrs. Elwood before their marriage, and that she heard him call her "Emily," when she desired him to call her "Emma ;" and the sister of this witness

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says he sometimes called her "Emily" or "Emmy," or "Emma." This is the only passage of the evidence which at all bears on this part of the case; the depositions of these two witnesses, (sisters,) is all that is brought to prove that Mr. Wright knew this lady by any other name than that of "Emma," used in the publication of the banns. If, therefore, the Court gave entire credit to these two persons, (though their account is full of improbabilities,) still it falls short of the proof which the law requires, to fix Mr. Wright with a guilty knowledge; but when the Court looks to the whole of the evidence in the cause, and compares it with the account given by these two persons, their story is so full of inconsistencies and improbabilities, that the Court is bound to dismiss it from its consideration.

Now, what is the story set up by Mr. Wright, and the probability (looking at the evidence) that he was a party to the fraud? It is this: that this lady represented herself to be an unmarried person, and a minor, and that she had a guardian, whose consent it was, under the circumstances, necessary to obtain; that the guardian would not give his consent to her marriage, and that, therefore, Mr. Wright agreed with her to substitute the name of "Emma" for "Amelia" or "Emily," and have the banns published in the former name. What comes out in the evidence? Why, that this lady, who, in 1826, it is stated, represented herself to be a minor, had been cohabiting for two or three years with Mr. Elwood, previous to their marriage in 1821; that she had passed herself off as a widow in Dublin; that at the period of her marriage with

Mr. Elwood, she was of the age of about thirty, so that, in 1826, when this marriage took place, she must have been thirty-five or thirty-six years of age; and I can hardly conceive that Mr. Wright could have been so grossly deceived upon this point as he wishes it to be believed he was, notwithstanding that the appearance of this lady was aided by the use of paint, which she was in the habit of applying liberally to her face, and by the pains taken in her dress. At all events, it must be supposed, that after the marriage, Mr. Wright could no longer have been deceived as to her age; and yet we are told, in evidence, upon which the Court is expected to rely, that Mr. Wright was in the habit of speaking of his wife as a minor and a ward—a story which destroys itself by its own improbability, if it were not defeated by the facts.

The Court cannot dismiss this case without a strong expression of its disapprobation of the conduct of Mr. Wright,—of the manner in which he has endeavoured to make out his case by a fraudulent attempt upon the vigilance and credulity of the Court, in setting up a story so improbable in itself, and defeated by the evidence adduced to support it.

I therefore pronounce, that there is a failure of proof in support of the libel, and I dismiss the party from further observance of justice in this cause.

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CONSISTORY COURT OF LONDON.

COLLETT *against* COLLETT.

JUDGMENT,

DR. LUSHINGTON.

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Divorce by
reason of
cruelty and
adultery.—
Cruelty not
proved.
Proof of
adultery
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Medical testi-
mony, how
considered.

This is a suit brought by the wife against the husband for a separation by reason of cruelty and adultery. The parties were married in July, 1826, and continued to cohabit together until the end of June, 1836; on the 30th of that month, Mrs. Collett quitted her husband's house, and went to reside with a relation in Norfolk. It is necessary for me to consider the charges contained in the libel given in on her behalf, and how far they are substantiated by the evidence in the cause.

The first charge is contained in the fifth article, which alleges that in July, 1829, Mr. Collett contracted the venereal disease, and it further pleads, that he acknowledged the fact to his wife, who discontinued sleeping with him; but on his declaring he was well, and on his promising not to offend again, she returned to his bed.

This is the first charge, and it is separate and distinct from that contained in the sixth article. The second charge is, that so soon after as September, 1829, he again contracted the venereal disease, which he concealed from his wife, and infected her, although Mr. Collett had consulted Dr. Gairdner, who warned

him that there was danger of communicating it ; that Mr. Collett took his wife to Dr. Gairdner, who prescribed for her, and it goes on to plead, that on Mr. Collett's promising fidelity, she forgave him, and again returned to cohabitation. This is nearly the substance of these two articles, in which it is alleged by Mrs. Collett, that her husband had the venereal disease twice in the year 1829, and that he knowingly communicated the same to her, and consequently, as I apprehend, that he was guilty of the offence of cruelty as well as adultery.

Now, I have no doubt that the deliberate communication of the venereal disease to his wife would constitute the offence of cruelty ; but the question is, how far this averment is proved on the present occasion ? The whole of this part of the case rests entirely upon the testimony of Dr. Gairdner. Dr. Gairdner does prove that Mr. Collett had the disease at the end of August, 1829 ; he proves that Mrs. Collett was infected in September of that year ; but there is no evidence whatever to establish the fact that Mr. Collett had the disease twice in the course of that summer. I am of opinion that the fifth article is utterly and entirely unproved. The question then remains, whether Mr. Collett, knowingly and wilfully infected his wife in the course of the year 1829 ? That the disease was contracted by him, and that his wife was thereby infected, are admitted by him in plea, and by his counsel ; but I think, that to establish so serious a charge against him, as that he knowingly and wilfully communicated this disease, requires very strong and conclusive evidence. The evidence of Dr. Gairdner is to this effect :—“ that Mr. Collett came to him in

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August or September, 1829, that he was a stranger to him; that he represented himself as being infected, &c.;" the object of his visit to me was in order to ascertain whether, in his then state, there was any danger of infecting his wife, by having sexual intercourse with her. I, after having had an inspection . . . was of opinion, and to him declared my decided opinion, that his having sexual intercourse, during the then present state of his health, would be extremely dangerous with reference to the probability of his infecting her with the same disease."

Now, if, after he had been warned by Dr. Gairdner, he had intercourse with his wife and infected her, that would have been a deliberate act of cruelty. But the evidence does not go to that extent; it does not appear that Mr. Collett slept with his wife after he had been warned by Dr. Gairdner, and on the 8th of September, he called upon him, and stated his apprehension that he had infected his wife. If the disease had been previously communicated, that would not be sufficient to shew a wilful intention on the part of Mr. Collett. He might very possibly have believed himself cured, and although he may have been careless and imprudent, there is nothing to shew the disease was wilfully communicated to his wife. I am bound therefore to acquit him of having, with his eyes open, and with malice aforethought, communicated this disease to Mrs. Collett.

In respect then, to this first charge, it being now limited to the crime of adultery, it is admitted that it was condoned by Mrs. Collett, voluntarily and with a full knowledge of the facts. I now proceed to examine the other charges.

The eighth article of the libel pleads, that this gentleman again, in April, 1833, contracted the venereal disease. This charge is distinctly proved by Mr. Brown, but on the other hand, I must observe, it is equally established that Mrs. Collett had a complete and perfect knowledge of what had occurred; that she afterwards returned to his bed, and that there was a condonation of the offence.

There is nothing further in the proceedings to which it is necessary to refer, prior to the charge in the ninth article, that is, the matters which occurred in June, 1836. Whatever might have been the footing upon which the parties lived together between 1833 and 1836, there is nothing, until this occurrence, which requires the attention of the Court. There may have been disputes between the parties—charges by Mrs. Collett on the one hand, and by Mr. Collett on the other; and these disputes may have been followed by reconciliations; but all these differences are entirely irrelevant to the matter of this suit, and to the points which I have to decide. Up to June, 1836, prior to the facts pleaded in the ninth article, after ten years' cohabitation, Mr. Collett, notwithstanding he had shewn himself regardless of the marriage vow, in reference to the crime of adultery, has not been proved to have been guilty of personal cruelty towards his wife. I must observe, that during the whole of this period, it is not even alleged that he treated his wife with any harshness, or that he attempted to inflict personal severity upon her. I say this in justice to Mr. Collett, that there is no presumption against him on this head—no ground of probability laid that he would have used the

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personal violence imputed to him in June, 1836 ; having been guilty of no misconduct of that kind antecedent to this period ; though he was guilty of other misconduct of a most serious and grave character.

The act of violence charged in the ninth article, is said to have taken place on the night of the 11th of June, and it is a single act. It is not pleaded that on this occasion any blow was inflicted by Mr. Collett on his wife ; but it is said that he abused her without cause, seized her arm with great violence, so that by his continued compression of it the arm was bruised, and that she was, in consequence, ill the next day. This is in substance the charge contained in this article ; the only charge of personal violence.

Now the only witness produced in support of this charge is Sophie Gérin. Her evidence upon this article is to this effect,—she says, that having heard the child she went up stairs, and she continues : “ I went to the door of the bed-room of Mr. and Mrs. Collett and heard the child there, and the voices of Mr. and Mrs. Collett ; I then went into the bed-room, and found Mrs. Collett lying on the carpet, as if she had fallen ; the child was in her arms crying, and on asking her what was the matter, Mr. Collett said ‘ Nothing, nothing ; ’ he scarcely said anything, but the child and Mrs. Collett talked together ; Mrs. Collett told the child, ‘ your papa has ill-used me, and I must leave him,’ and the child said ‘ Naughty papa.’ When Mrs. Collett said that she must leave him, Mr. Collett answered ‘ then why don’t you go ? ’ and I believe he said ‘ why dont you go to-night ? ’ but he did not act

or speak to her with violence in my presence or hearing. Mr. Collett, after a little while, said to Mrs. Collett, 'I dont know what you are going to do, but I am going to bed,' upon which Mrs. Collett said that 'she did not intend to sleep there, but that she would sleep in the next room (which was a spare bed room) with the child,' and she went with the child, I accompanying her into that room; Mrs. Collett afterwards altered her mind, and sent the child up stairs again, and desired me to remain and sleep with her, which I did. While undressing Mrs. Collett, she told me that Mr. Collett had, that evening, been ill-using her, and she shewed me her arm, which I saw was bruised above the elbow, and she said that such bruise had been caused by Mr. Collett holding her violently to prevent her going to the door and showing a light to the child, when she, Mrs. Collett had heard the child screaming. I recollect that Mrs. Collett was very poorly on the next day, but whether she was confined to her bed throughout the said day I am not sure, and I cannot remember to have observed the bruise on her arm after the evening of its happening; I did not myself hear Mr. Collett say that he wished the child had broken her neck." The question is, whether this evidence, for I am not aware that there is any other testimony in the cause which can properly be said to bear upon this point, is sufficient to lead my judgment to the conclusion that Mr. Collett was guilty on this occasion of cruelty in the eye of the law. I think, considering that this is a solitary charge of cruelty, and that there is one witness only in support of it, that I should go too far to hold that it is sufficient to

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found a sentence of separation upon. I think so, if the case rested here, but if I had any doubt I should be confirmed in my opinion by what is pleaded by Mrs. Collett herself, in the tenth article of the libel, which was altered after debate, so that the attention of the party was drawn particularly to that article. It is pleaded in that article, that in the evening of the next day, the said Emma Collett was commanded by the said John Collett to return to his bed, which she accordingly did, with great reluctance, &c. ; so that it is admitted by this lady, that almost immediately after the act of cruelty committed by her husband (if it was cruelty at all), she returned to the bed of that husband. It is true, that in the article her return to cohabitation is qualified by the averment that it was “with great reluctance;” but I must say that looking to the whole circumstances of this proceeding, and to the conduct of this lady from the beginning to the end, I am not prepared to say that her reluctance could have arisen from a fear of personal violence at the hands of her husband. I cannot satisfy myself, from the whole of the *res gestæ*, that there is the least probability that Mrs. Collett, who had friends to protect her, who was not left desolate in the world, or abandoned by her connexions, would have returned to the bed of her husband if she had entertained any apprehension of personal ill-treatment; and this view of the case is entirely corroborated by what is pleaded in the eleventh and twelfth articles, for an express reason is assigned for Mrs. Collett’s leaving her husband’s house—not a fear of personal violence, owing to what occurred on the 11th of June, but as expressly pleaded, because she

was apprehensive that he was then infected with the venereal disease, and had again communicated the same to her.

On this branch of the case then I have no hesitation in saying that the treatment of his wife, by Mr. Collett, on the 11th of June, 1836, is not such as to justify me in pronouncing for a separation.

Before I proceed to the remaining part of this unfortunate inquiry, it is necessary to see the position in which the case now stands. I have come to the conclusion (and I have no difficulty in doing so, as the facts are admitted) that Mr. Collett had twice committed adultery; that he had twice been infected with the venereal disease, and had once communicated it to his wife, but that both these acts of adultery had been duly condoned and pardoned by her.

The remaining part of the case is of a nature exceedingly difficult to examine with the ordinary means; but it is still a duty incumbent upon me to consider it with all the care and means in my power. The last charge is, that Mrs. Collett was again infected with the venereal disease when she quitted her husband's house on the 30th of June, 1836, and that on the 19th of August, when she consulted Mr. Crosse, a surgeon of Norwich, he found her to be then labouring under the disorder. Now assuming, without at present deciding what the fact may be, that Mrs. Collett had the venereal disease when she quitted her husband's house, what inference would the law draw from a fact of that description? What would be the conclusion of law as to adultery? Does it establish the fact that the husband

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must have been guilty of adultery? Clearly it does not necessarily prove the guilt of the husband, for it is at least possible, that the wife may have contracted the disease from another quarter. It is impossible to lay down any general inflexible rule, for each case must depend on its own circumstances, and it is scarcely possible to conceive a case without some circumstances which would assist the Court in coming to a conclusion. I may further merely observe, that I think it unnecessary to press this inquiry further, for if any such case should occur, bare of circumstances, it will then be time to consider this important point. In this case there are many circumstances, the effect of which I must consider presently. But the point to which I must first direct my attention, is the question of fact so much discussed by the counsel on both sides, whether Mrs. Collett had or had not the venereal disease when she quitted her husband's house in June, 1836.

It is very important, before I proceed to state the evidence, and the impression which it has made on my mind, that the principles which ought to prevail, should be clearly understood. The principal evidence is the testimony of a medical gentleman of the name of Crosse. Now what degree of credit and weight ought to be given to the evidence of medical men under the circumstances in this case? I apprehend that medical evidence may be of two kinds, and that it is under such conditions that medical evidence is received in other Courts.

First.—That it is necessary for the satisfaction of the Court that it should be informed of the conclusions drawn by persons of skill and science as to a

matter, from facts proved in the cause *aliunde*, for instance, it may ask the opinion of medical men if so and so were the case.

Secondly,—Which is a superior kind of evidence, opinions founded upon the observation and inspection of the medical man himself. I find that such evidence is received in all questions of murder, infanticide, and poison; the learned judges who preside in the Courts where such questions arise, rely not merely upon the opinions of medical men who have seen the body; but persons are frequently produced in Court and examined who have not seen the body; and in the well-known case of Lord Gardiner, in the House of Lords, the evidence of medical men was mainly relied upon. On a consideration of what is done in other Courts, and from the extreme difficulty of the Court's forming a judgment in a matter of this kind, I think, if there be medical evidence speaking to the fact of venereal disease, and there be sufficient opportunities for the medical witness to form his opinion, I am bound, unless his evidence be discredited, to believe it. Let us consider a little into what difficulties any other mode of looking at this evidence would lead us. How is it possible that the Court, having had no medical education, could deduce from the symptoms that the disease was of this or that character? particularly where, as in the present case, there is great difficulty in distinguishing between symptoms of a similar character, and drawing a correct conclusion.

This, therefore, is the principle upon which I shall consider the evidence of Mr. Crosse. I do not intend to go into the disgusting details of his

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evidence with minuteness. Mr. Crosse proves that on the 19th of August, he saw this lady, and from personal examination, and from an inspection of the linen which was brought to him, he swears distinctly that she was at that time suffering under venereal disease, in consequence, he says, of "recent impure contact." Why should I distrust Mr. Crosse? Is he an incompetent witness? What right have I to suppose that he has made a mistake? I do not see any ground why I should distrust the evidence of Mr. Crosse, or suppose that when he believed that this lady was affected with the venereal disease, he was labouring under a mistake. I must, therefore, come to the conclusion, that in whatever way it was contracted, at the period when Mr. Crosse saw this lady, she was, undoubtedly, suffering under the venereal disease. I am aware that there is a part of the case, which was pressed in argument by the counsel for Mr. Collett, and which I advert to, in order to show that I have not overlooked it; I mean the exhibition of certain linen of 1835, which had been preserved, and which may raise a suspicion that Mr. Crosse's opinion might be partly founded upon that; and certainly it is not satisfactorily explained by the evidence; it comes out in the testimony of Sophie Gérin. But it does not raise any inference to justify me in disbelieving the opinion of Mr. Crosse, founded upon personal examination, and upon the inspection of linen recently worn by Mrs. Collett. I now dismiss this disgusting part of the case.

Being satisfied then by the evidence, that it is proved that Mrs. Collett was infected with the disease on the 19th of August, what is the legal

inference to be deduced from the fact? Am I to conclude that the husband communicated such disease to her, and that consequently he was guilty of adultery? Now it cannot be denied, that Mr. Collett was exceedingly unmindful of his marriage vow; that he had indulged in intercourse with women of a lewd description; and that he had twice before been infected with the disease, and these offences lay a strong ground of probability that he would be guilty of a third lapse. On the other hand, against the conduct and chastity of Mrs. Collett there is not the slightest imputation, much less is there a shadow of ground for an argument that this lady indulged in habits, which would render it likely, that she should have had such a disease from any other person than her husband. But it was pressed by the counsel for Mr. Collett, that from the lapse of time between the 30th of June and the period when Mr. Crosse examined Mrs. Collett, and found her infected with the disease, it was highly improbable that the husband could have communicated it to her. This objection, however, is removed by the testimony of Mr. Crosse, who expressly swears, at the end of his answer to the thirty-ninth interrogatory, that in his opinion the disease might have been communicated to her sixty-six days previously; and the result of the testimony of the medical men is, that in the case of a female, the lapse of ten weeks after cohabitation with her husband is not such a lapse as would render it at all improbable that he was the cause of the contamination. There being then, in this case, an entire absence of all suspicion that the disease could have been communicated by any other person, the Court

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is bound to infer that the husband, who had had the disease twice before, and had once before infected his wife, had the disease again, and again committed adultery. Is any other solution of the evidence practicable? If I am to come to any other conclusion, I should go in the teeth of all the evidence, and I should distrust the medical testimony, particularly that of Mr. Crosse. If I were to doubt the fact of the disease being communicated by Mr. Collett, I must hold Mrs. Collett herself guilty of adultery; any attempt to come to a different conclusion would be the greatest absurdity, and would be diverging from the strict line of all judicial proceeding, namely, to credit the evidence of respectable persons, unless they are contradicted, or unless there is something in their testimony to excite a suspicion of the fidelity with which they have deposed.

I must observe, that in coming to the conclusion I have done, if there is any error in my judgment, Mr. Collett must take the blame to himself. It is the conduct of Mr. Collett which renders the conclusion to which the Court has come a probable one. Mr. Collett, by the conduct admitted by himself, by his gross violations of his marriage vow, on former occasions, has laid a foundation for the opinion I have given, and the conclusion to which I have come; and if it should unfortunately be founded in error, (as I do not think it is), I am bound to give a judgment supported by admitted facts in the case, and not inconsistent with the circumstances. The result of the evidence leads me to the conclusion, that Mrs. Collett is entitled to a separation from her husband, by reason of adultery

committed by him, as pleaded in the twelfth and thirteenth articles of the libel; but not on the ground of cruelty, from which I entirely acquit Mr. Collett.

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Affirmed on appeal in the Arches Court, June 8th, 1838. *reversed by Jud: Comm: see judgment in which some novel features are developed as Text: di: Con vention &c. July 14. 1840:*

PREROGATIVE COURT OF CANTERBURY.

KOSTER against SAPTE.

On Petition.

MARTHA SAPTE, spinster, a native of Tuscany, and domiciled at Leghorn, died in April, 1811, possessed of property in Tuscany, and also personal estate in England to the amount of 3,000*l*. She made a will on the 25th of May, 1805, by which she bequeathed various legacies, and among others one of 200*l*. to Amelia Koster, wife of John Adolphus Koster. The residue of her property in this country she gave to her nieces, Jane and Julia Sapte, resident here, and in case of their decease that residue was given to Francis Sapte and Henry Sapte, her nephews, also resident in this country. She appointed certain persons her executors, and substituted others in case of their decease; one of such

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The Court will not revoke an administration which has been outstanding for a considerable time, unless weighty reasons be shewn for its revocation. A decree having been taken out to shew cause why letters of administration with will annexed, limited to property in this country, of a person who died domiciled at Leghorn,

should not be revoked, as being void under a sentence of the Courts at Leghorn, and also as having been obtained through a suppression of facts, the party calling in the administration not having proved the sentence of the Court at Leghorn, nor the other ground alleged, to the satisfaction of the Court; the Administrator, who appeared under protest, dismissed with 50*l*. costs.

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executors being Mr. J. A. Koster, the husband of Amelia Koster. Shortly after the death of the deceased, a copy of the will was sent to Mr. Francis Sapte, in this country, but no steps were taken to obtain probate here until 1813, when, upon the death of Julia Sapte, the last surviving residuary legatee, Mr. Francis Sapte took out letters of administration of her effects, and as her representative applied for letters of administration, with will annexed, of Martha Sapte, limited to the property here; and upon an affidavit made by him, stating that the original will was remaining of record at the Courts at Leghorn, and that the executors were in Tuscany, and not likely to come to this country, a decree issued, calling upon the executors to take probate in this country, or shew cause why letters of administration, with will annexed, limited to the property in this country, should not be granted to Mr Francis Sapte, as the representative of Julia Sapte. This decree was served in the usual way on the Royal Exchange, and no appearance being given, the limited administration was granted to Mr. Sapte, who remained in the possession of the grant until this time.

This administration was now called in, a decree having been extracted by Mr. Peter Frederick William Koster, the son and representative of Amelia Koster, who died in 1820, (Mr. Koster, her husband having renounced,) calling upon Mr. F. Sapte, the administrator of Martha Sapte, to shew cause why the letters of administration should not be revoked, as having been unduly obtained, and administration granted to him as the representative of Amelia Koster. To this decree an appearance was given under protest.

On behalf of Mr. P. F. W. Koster, the party calling in the administration, it was alleged, that Martha Sapte, the deceased, a native of Tuscany, died domiciled at Leghorn, by the laws of which country the disposition of her personal estate is to be governed, that by her will she appointed certain persons executors, one of whom, J. A. Koster, was the husband of Amelia Koster, (since deceased), whilst living the niece of the deceased, and, who, together with her husband, were domiciled subjects of Tuscany; that the deceased's nieces, Jane and Julia Sapte, and her nephews, Francis and Henry Sapte, were domiciled in this country; that by the then and still existing laws of Tuscany, such portion of the deceased's property as was given to them, in consequence of their being so domiciled, devolved upon Amelia Koster, as the sole next of kin of the deceased resident in Tuscany; that the deceased, by the laws of Tuscany, was dead intestate as to that part of her property which was in this country; that notwithstanding the premises the Fiscal authorities at Leghorn claimed such portion; that such claim was resisted by Amelia Koster, and that on the 4th of December, 1811, a sentence was pronounced in her favour by the tribunal of First Resort, which sentence was appealed from, but affirmed by the superior Court on the 7th of July, 1812, and general administration of the deceased's effects granted to Amelia Koster, who paid debts and expenses exceeding the effects of the deceased by three thousand pounds. That in October, 1812, copies of these decrees were sent by J. A. Koster to Mr. Sapte, the other party, the receipt whereof he acknowledged; that nevertheless he proceeded to obtain the limited

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administration with the will annexed, without disclosing such decrees to the Court, he being aware that by such decrees the residuary legatees here were declared to be legally debarred of all property under the will.

For the party cited and in support of the protest, it was alleged, that Francis Sapte, the administrator, soon after the deceased's death, received from the executors a copy of the will, for the purpose of the same 'being proved in this country ; that in August, 1813, the administration was granted, that the legacies were paid here and also abroad by the executors, by which they recognized the validity of the will, that F. Sapte was for several years the agent of J. A. Koster, that he credited the account of the said J. A. Koster with the 200*l.* legacy to his wife, Amelia Koster, a receipt of which account was acknowledged by Mr. Koster,—that Amelia Koster died in 1820 ; that her husband survived her, but took no steps in calling in the administration ; that on the 16th March, 1836, P. F. W. Koster, her son, upon the renunciation of J. A. Koster, her husband, took administration of her effects ; that in 1820, the said P. F. W. Koster was resident in London, and had ample opportunities of taking steps for calling in the said administration : that at the time of the proceedings in the courts in Tuscany, the duchy of Tuscany was in the possession of the French armies, then in a state of hostility with this country, and that Jane and Julia Sapte, and Francis Sapte, were then resident in this country, and had no means of appearing in those Courts. That the law was not, as alleged by the other party ; that parties domiciled out of the dominions

of the grand duke of Tuscany were precluded from being entitled to the personal estate of persons domiciled and dying within those dominions, unless by the laws of the country in which such persons resided and were domiciled, persons residing within the dominions of the 'Grand Duke of Tuscany, were in like manner precluded from succeeding to the estates of persons dying within that country,—and reference was made to the Royal Ordinance, of the 3rd of August, 1784, and to the 726th and 912th article of the code Napoleon, which declared to that effect.

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Lushington and *Addams* for Mr. Koster.

The administration granted in this case is void, on two grounds.

In the first place, it was obtained by concealing from the Court the facts of the case; it has been therefore surreptitiously, and in the legal sense of the term, fraudulently obtained.

In the second place, the will of Martha Sapte is of no validity, so far as respects the disposition of the property in this country; consequently, neither Jane Sapte nor Julia Sapte, nor Francis Sapte were entitled to take anything under it.

After the death of the testatrix, proceedings took place in the Courts of Tuscany, and it was finally decided that she had died intestate as to all legacies out of the Tuscan dominions; that the will as to them was void; and administration was granted by the Tuscan Courts to Amelia Koster.

When Mr. Sapte applied to this Court for administration with the will annexed, he was in possession of information that the Courts in Tuscany had

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pronounced the will void *quoad* the legatees in this country; yet he stated in his affidavit that the will was of record in the proper Court at Leghorn; the inference which the Court would draw from this was, that the will was in force there; the Court, therefore, received a false impression from the affidavit of Mr. Sapte: this was, therefore, a legal fraud, and no lapse of time prevents the ripping up of a legal fraud.

THE COURT.

Does that rule apply where the adverse party is aware of the fact, and takes no step?

Argument continued. If he is aware of it, and being resident in this country, remains dormant for twenty years, it might bar him; but here the parties were resident abroad, and did not know the administration had been granted to Mr. Sapte. Besides, the party then interested was the mother; the right of the party now before the Court did not commence until 1836, when he took administration of his mother's effects.

The rule of law is now settled, that the *lex domicilii* shall govern the disposition in testacy or intestacy, as well as the meaning of the instrument. *Hog v. Lashley*, 6 Bro. P. C. 577. Robertson on *Personal Succession*. On the death of Martha Sapte, the proper tribunal to decide as to the validity of her will, was that of the country in which she died domiciled: the Tuscan Tribunal. The *lex loci rei sitæ* is repudiated by all civilized nations. Here are decrees pronouncing the will null and void by the laws of Tuscany.

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I have not those decrees before me.

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Argument continued. We so allege, and it is not denied.

The next point is, can the validity of the decrees be impeached? What is the effect of a foreign judgment, and how far is it conclusive on the present occasion? Suppose the judgment not to be conclusive, in what way is its validity examinable?

First. Is the foreign judgment conclusive? The last case in the House of Lords, is “*Houlditch v. Donegal*,” 8 Bligh, 301, where the whole of the authorities are collected. The result of the judgment in that case was, that, in the opinion of Lord Brougham, there were cases in which it was competent for the Court to look into the grounds and reasons of the foreign judgment, and satisfy itself as to the law of the country. In “*Martin v. Nicolls*,” (a) the Vice Chancellor held a foreign judgment to be conclusive. Under certain circumstances we admit, where there is a question as to jurisdiction, or whether the party was cited according to law, and for some other purposes, that you may examine a foreign decree; but you cannot open any decree of a foreign country, and try by your own lights and knowledge, whether the foreign judgment was pronounced on good ground or not.

Second. If the judgment be not conclusive, how is its validity to be tested? Not by the opinions of Advocates,—opinions can have no weight against a decree of a competent Court.

(a) 3 Simon, 458.

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The whole question comes to this, whether there be a valid will or not, according to the law of the place where the party died domiciled?

Burnaby and Haggard, contra.

The party cited to bring in the administration, has been in possession of the grant for twenty-four years: there is no instance in which an administration so long outstanding, has ever been revoked, though the Court has power to revoke it, if it has been obtained under false pretences, and by a deception practised upon the Court itself. If Mr. Koster is precluded from any advantages by the grant of administration obtained by Mr. Sapte, it is through his own *laches*. As next of kin of the surviving residuary legatee, Mr. Sapte has a right to the administration. The judgments of foreign Courts, when proceeding *in rem*, are said to be conclusive, but not as to moveable property out of the jurisdiction of the country pronouncing the judgment. (a) There is no proof that the law of Tuscany precluded a person in this country from receiving a legacy under the will of a Tuscan subject, out of property *here*. The sequestration of the property of English subjects, by the Berlin and Milan decrees, did not take this property from Mrs. Martha Sapte, who was not an English subject. Mr. Sapte, in his affidavit, says, and, he believes, that the copy of the will was sent over to this country to be proved; for what other purpose could it have been sent? Mr. Sapte remitted to Mr. Koster an account of the payments for proving the will, which Koster acknowledged. Mr. Sapte's

(a) See Phillipps & Amos on Evidence, pt. 2, ch. 1, sect. 3, p. 532.

impression was, that the decree which was obtained, without the knowledge of the residuary legatees, could not refer to property out of Tuscany, and the Court, even now, is not instructed as to what the decree really was. Mr. Sapte, therefore, was justified in applying for administration, and there is no pretence for saying that there was any concealment or misrepresentation practised on the Court, when he stated, as he believed, that the will was of record in the foreign Court, for he considered the will a valid instrument.

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JUDGMENT.

SIR HERBERT JENNER.

The administration which has been taken out in this case is of so long standing, that the Court is very unwilling to disturb it, without weighty reasons being shewn for the revocation of such an administration regularly granted. The Court would, undoubtedly, revoke an administration, if sufficient ground were shewn; but the party who seeks to impeach the administration, must state the grounds upon which he is entitled to impeach it; *prima facie*, the title to the property is in the residuary legatees.

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It is stated that the administration is revocable on two grounds: First, that by the law of Tuscany, as it existed on the death of the deceased, residuary legatees living domiciled out of the Tuscan dominions, generally, were not capable of taking under the will: Secondly, that when Mr. Sapte obtained the administration with the will annexed, he concealed from the Court that proceedings had taken place in the Courts at Leghorn, with respect

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to the deceased's property, and that it had been decided to belong to Mrs. Koster, as nearest of kin to the deceased in Tuscany, and that administration had accordingly been granted to her. So that the case on the part of Mr. Koster, the party taking out this decree, stands on these grounds: the incapacity of the residuary legatees to inherit according to the law of Tuscany, and the suppression of the proceedings at Leghorn, from this Court, which would have prevented the Court from granting the administration. The party setting up such a case, is bound to furnish the Court with the law of Tuscany, and the proceedings of the Courts in that country, by which it was decided that the property in England belonged to Mrs. Koster. How is the Court to be satisfied on this point? It must have information as to the law of Tuscany.

It has been said that proceedings of a certain kind took place before the tribunals of Leghorn, and the question having been decided there, this Court cannot inquire into the validity of the sentence. But the first question before the Court is, what was the law of Tuscany at the time? Whether all persons residing out of the Tuscan dominions, were incapacitated from succeeding to the personal estate of a Tuscan subject, or whether the incapacity was limited to certain countries? whether the whole property of a subject of Tuscany, wherever situated, was affected by the law, and the incapacity of residuary legatees was general, applying to all persons out of the Tuscan dominions, or only to persons resident in this country at that time, in a state of hostility with the authorities then in Tuscany, namely, the French, who were then in pos-

session of Tuscany, and had substituted their laws for those which originally existed in the Tuscan dominions.

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Although succession to personal property is governed by the *lex domicilii*, and not by the *lex loci rei sitæ*, yet a measure controlling the law of a country, may be limited and qualified, so as to affect certain descriptions of property only ; and it does not appear, from the proceedings in this case, that it was a general law, applying to *all* property, where-soever situated, but only to what was in the Tuscan dominions. Although the rule, that personal property is supposed to accompany the owner, wherever he goes, is true to a great extent, and, in general cases, it cannot be said to be universally true without exception. For what was done in this case ? There was a sequestration of English property, real and personal, in that country, and if this included *all* personal property, wherever situated, which accompanied the person to the person's domicile, it would go to shew that the sequestration ought to extend to property in this country ; and if it had so happened that the French had remained in possession of Tuscany, they would have been entitled to the property, and this country would have been bound to give it up to them when hostilities ceased, in obedience to the Berlin and Milan decrees, against which this country had been in the habit of protesting : which would be absurd.

What has the Court before it on this point ? It is said, the law of Tuscany must be proved by the sentence of a competent tribunal, and I am not prepared to say that this is not a proper way of proving the law of a country : but how is the sentence

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proved? Here is no copy or exemplification of the decree, but a mere averment of an interested party, and a certificate, bearing no marks of authenticity, purporting to be a certificate of sequestration. In all cases of decisions of foreign Courts, an exemplification of the judgment is required, and although, in some few cases, foreign judgments have been received as evidence of what was decided, and held to be conclusive on certain points, yet in *Houlditch v. Donegal*, it was held that a foreign judgment was open to examination—in point of fact, the judgment is no more than *prima facie* evidence of what was decided, and is good until it is impeached. At all events, according to the opinion of the learned judge referred to in the argument, a foreign judgment may be examined for certain purposes: if not, how is the Court to know the effect of it? Therefore, the production of the judgment is the root and foundation of the whole proceeding, without which the Court cannot proceed a single step.

What is the Court called upon to receive as a substitute? A certificate of replevy of property, belonging to Martha Sapte, purported to be sequestered by the French authorities, in pursuance of the Imperial decree of 21st November, 1806. The decree of sequestration referred only to that part of the property actually sequestered, and to no other. It is simply limited to the property sequestered under the decree of 1806, and as far as this certificate goes, it can only shew an incapacity to inherit that.

As the judgment is not produced before the Court, the Court cannot tell what the effect of it

might be ; but if there was a judgment, it should have been produced, because the whole question turns upon the incapacity by the law of the country. The certificate has no marks of the character of a Court of law.

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But suppose the judgment went to the extent of the certificate, what would be its effect? The sequestration was of the property of Martha Sapte in *that* country ; it could have no effect upon the property in *this* country.

If it is not proved to the satisfaction of the Court, that by the law of Tuscany the property of Martha Sapte in this country was not inheritable by persons domiciled here, what becomes of the imputation against Mr. Sapte of keeping the fact from the knowledge of the Court? If the law of Tuscany, to the effect alleged, had been clearly established before the Court, perhaps it might have considered it sufficient to revoke the administration on the ground of a suppression of a material fact ; but where the Court is in the dark as to the law of Tuscany, there is no ground of imputation against Mr. Sapte, for keeping information from the Court. If the judgment of the foreign Court was in conformity with the Berlin and Milan decrees, I doubt whether the Court could hold it binding and conclusive on the party, so as to make the grant a nullity.

But, independent of this circumstance, what is there to account for the lapse of time in instituting this proceeding? In 1813, the administration was granted to Mr. Sapte. In 1814 Tuscany was restored to the Austrian Government. If, therefore, there was an inability to proceed earlier, in 1814,

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it was quite competent for Mr. Koster to proceed, in order to recall the grant of administration[?] to Mr. Sapte. But no step was taken by him. In 1820, his wife died, and he has not taken administration of her effects. The party now proceeding was resident in this country in 1820, and continued here some time, but it is not till the year 1836, twenty-three years after the administration had been out, that a single judicial step was taken—a circumstance which influences the Court considerably in refusing to disturb the administration.

I am clearly of opinion that there is no ground whatever in proof before me for disturbing the grant already made, and that the protest under which the party cited has appeared is proper, and I pronounce for it; and I am bound to say, that it was incumbent upon the party proceeding to furnish the Court with the fullest information; and as he has not produced the document from which alone the Court could be instructed as to the law of Tuscany, he must take the consequences of an experiment made at his own risk. He has given security for costs to the extent of fifty pounds, and I am of opinion that I should not do justice to the party in possession of the administration, if the other party is not condemned in costs to that extent. I, therefore, pronounce for the protest, dismiss the party, and condemn Mr. Koster in the costs to the extent of fifty pounds, if they amount to that sum.

SATTERTHWAITE *against* POWELL.

On Petition.

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ANN ARMETT, the deceased in this case, sailed in January, 1819, with her husband, Cæsar Colclough Armett, Esq., then a major in the 35th regiment of infantry, and four children, on a voyage from Bristol to Cork, in a vessel called the Berwickshire Packet, which was lost in the Channel, and every one on board perished.

Where husband and wife are drowned by the same accident the presumption is that they died at the same time ; and in order to entitle the next of kin of the husband to the wife's property, it must be shewn that he survived the wife.

By an indenture of settlement, dated the 19th of February, 1811, certain property was settled previously to the marriage of the parties in trust, for the separate use of the wife during her life, and after her death for the husband for life, in case he survived her ; and after the death of the survivor, then as she should appoint by deed or will among her children ; but in case of the children dying under twenty-one and unmarried, and in default of appointment, then in trust for her executors, administrators and assigns, and personal representatives, to and for their own proper use and benefit. The deceased made no appointment and was dead intestate, and on the 3rd of June, 1819, letters of administration of her effects were granted to Mary Satterthwaite, widow, as her mother and next of kin. She was now dead, and had left part of the goods of the deceased unadministered, and the question was,

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whether administration of the unadministered effects of Ann Armett should be granted to her next of kin or to the representatives of the husband?

The Queen's Advocate and *Haggard*, on behalf of Frances Powell, the administratrix of the husband, contended, that where the husband and wife perish by the same accident, the ordinary presumption of law was that the husband survived. Such was the doctrine of the civil law (a), and in *Taylor v. Diplock* (b), such it should seem was the opinion of Sir John Nicholl, for after stating the facts of that case, he says:—"Looking to their comparative strength, there is nothing to take away the *ordinary* presumption, that a man was likely to survive a woman in a struggle of this description." In that case the property was the husband's, and the administration was granted to his next of kin. Here the property was the wife's, and there being nothing to shew that she survived, and the presumption being that the husband would live the longest, the administration should go to his representative.

Lushington and *Addams*, contra.

SIR HERBERT JENNER.

It appeared to me that this point was settled; the principle has been frequently acted upon, that where a party dies possessed of property that the right to that property passes to his next of kin, unless it be shewn to have passed to another by survivorship. Here the next of kin of the husband

(a) Dig. 34, 5, 9, 3.

(b) 2 Phill. p. 261—279.

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claims the property which was vested in his v that claim must be made out, it must be shewn the husband survived. The property remains w it is found to be vested, unless there be evidenc shew that it has been divested.

The parties in this case must be presumed have died at the same time, and there be nothing to shew that the husband survived wife, the administration must pass to her r of kin.

GOOSE and BAILEY against BROWN.

This was a cause of proving in solemn form law the last will and testament, with a codicil John Anderson, a market gardener, of Croyd deceased, bearing date respectively the 4th March, 1837. The instrument was propounded Mr. John Goose and Mr. Benjamin Bailey, two the executors, and was opposed by Thomas Brown an executor in a former will, dated 23rd February 1836, with two codicils thereto, dated 6th and 1 October following. There were also remaining the registry another will, bearing date October 23rd, 1833, and a codicil dated July 8th, 1834.

The will was propounded in a condidit, up which the three witnesses who attested the execution were examined.

It appeared that Mr. Bailey, one of the executors

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and who took 250*l.* under the will, gave the instructions to Mr. Drummond, and that the will was drawn by Mr. Drummond, without his having seen the deceased: when completed, the will was sent to the deceased's house for his perusal; and Mr. Drummond and his two clerks soon after attended to witness the execution. The contents of the instrument were as follow: The deceased devised the house in which he lived, with the land thereto adjoining and two cottages to Mr. Thomas Brown, of Hampstead, gardener, subject to a charge of fourteen shillings per week, to his servant Elizabeth, and the wife of Joseph Baker during her life; Joseph Baker and his wife also to live in the cottage they occupied, free of rent, taxes, and repairs during their lives and the life of the survivor; on the decease of the survivor, their children in the same manner to occupy the cottage; a cottage was given in the same manner to William Jones and his wife and four children. Two cottages to Jane Elizabeth, the wife of Thomas Jeffery Bailey and her heirs and assigns for ever; two cottages also to William Jones aforesaid, his heirs and assigns for ever.

To George Steers, of Croydon, tailor, 50*l.*

To John Thomas Twigg, 100*l.*

To Benjamin Bailey, 200*l.*, besides 50*l.* to him, as well as the other executors, for their trouble; the wearing apparel was given to Mr. Jones, and the residue of the property to Marian Anderson, the sister of the deceased, and he appointed Messrs. John Goose, Benjamin Bailey and Charles Lashmar executors; and if Benjamin Bailey died in the deceased's lifetime, he appointed Benjamin Ellinsworth Bailey an executor in his stead, with 50*l.*

By the codicil the household furniture was given to Mrs. Baker.

Mr. Drummond deposed, after stating that Mr. Bailey gave him the instructions, and speaking to the respectability of Mr. Bailey, "after Mr. Bailey was gone, I immediately altered the old will in pencil to form a draft of the new one, and then gave it to my clerk, Mr. Chrees, who made a fair draft, which I corrected, Mr. Chrees then, by my direction, made two fair copies for signature. I recollect that Mr. Bailey had requested that two copies should be made, and on the next following day, viz., the fourth of March, I put one of these copies in an envelope, sealed it, and sent it to Mr. Anderson. It was all prepared for execution, except the blank left for the date; I forget at what hour it was exactly that I sent it, but it was during office hours. I sent it by my servant to Mr. Anderson, and in about half an hour after, I took two of our articted clerks, my fellow witnesses, Mr. Arthur William Woods and William Weall, with me, to the deceased's house, for the purpose of attesting the execution of it. I carried with me the duplicate copy; I don't remember whether it was morning or afternoon, but if the latter, it must have been before five o'clock, because Mr. Weall leaves at that time. On arriving there, the old servant, William Jones, let us in and shewed us into a parlour, where we found Mr. Bailey, and directly we went in, he said to me, 'You have omitted one thing, the furniture, &c., was to have been left to Mrs. Baker;' I said, 'It was—it is an omission of mine, I'll rectify it by a codicil, and it will make no difference;' I then sat down at a table in the room,

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and drew up a codicil to the effect just named, I did it on the will and also on the duplicate, and on my draft, which I had also brought with me. The will was lying on the table at this time ; while I was so engaged, Mrs. Baker came into the room with a lighted candle, which, at my suggestion, Mr. Bailey had gone to the door and asked for, and I then put a seal on the codicil and duplicate. I found wax there, I had not brought any with me, not knowing it would be necessary ; I used my pencil case to make the impression ; Mr. Bailey then gave the will and duplicate, with the codicil on each, to Mrs. Baker, to take up to Mr. Anderson for his signature. I was not surprised at this mode of executing the will, because Mr. Bailey had told me at his visit to me at the office, and which is, I believe, the only thing I forgot to state, that the will would be executed in that way, for that Mr. Anderson was very nervous in the presence of strangers, that, nervousness was his complaint, and so great was it that he never saw strangers, and that even he himself had never spoken to him ; that testator had often seen him pass and repose while at his window, but had never asked him to walk up ; that so great was his nervousness, that he thought there would be great difficulty in his signing the will in the presence of any strangers. So I was prepared for his signing the will first, and it was agreed that after he had signed it quietly, I was to see him afterwards and to hear him acknowledge it. Mrs. Baker then took the will and duplicate out of the room, and I heard her go up stairs, she shortly returned and brought them down, and said Mr. Anderson was ready, my two clerks and myself

then accompanied her up stairs, and she shewed into a bed room on the first floor, a front room where we found an old man sitting up in bed. He had a clean day shirt on; Mrs. Baker met us, opened the door for us, and when we entered she shut it and left; I addressed the deceased, saying, 'How do you do, Mr. Anderson?' or some salutation of that sort, adding, 'I'm sorry I made a little mistake in your intentions, and that I've given you the trouble of signing twice, but it's all the same now there's a codicil, as if it had been put into your will:' he said, 'Oh, it's no matter, or, don't mention it,' as shewing that he did not mind the trouble he had had; I then took the will, which, if Mrs. Baker had brought it down, I had carried up again as well as the duplicate, but as I have no distinct recollection of that fact, she may have left it on a table in his room while she announced to us that he was ready, and I put it before him, and said, 'Put your finger on this seal,' and he did so, (the seal on the will,) I then said, pointing to his signature, 'You acknowledge that to be your handwriting, and you declare this to be your will, in our presence, and request us to be witnesses;' he said in a very agreeable manner and pleasant tone of voice, 'I do,' he looked at me and smiled as he said it; he also repeated after me as I said the words in a solemn tone, 'I declare this to be my will, and request you to witness it;' I then pointed to his signature to the codicil, and said, 'You acknowledge this also to be your handwriting, and he said 'Yes;' I added, 'You declare this to be a codicil to your will, in our presence, and request us to be witnesses,' and he again said 'Yes;'

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then took the duplicates and said, 'You do the same to this, it is an exact copy,' meaning of the other, and he said "Yes." I went through the execution of the duplicate in that short manner, thinking it sufficient, though from his appearance, I did not observe any signs of exhaustion which might cause me to avoid troubling him to go through the form again; we three then signed the will and codicil, and duplicate, in his room, at the table. There were chairs, three chairs put there ready, and we sat and signed in his presence, and in that of each other. We did not see him sign at all, I am sure of that, but only heard him acknowledge his signature; he did so three times, first to the will, then to the codicil, and then to the duplicate of both jointly; several other things passed before we came away. I had, I recollect, two envelopes with me, I put into each one of the wills, and sealed it up; there was a lighted candle in the room, but how that was brought I forget; I gave one of the packets to Mr. Anderson, and the other I took down and gave it to Mr. Bailey; both envelopes were endorsed with the name of the deceased and his executors, as containing his will. The deceased, I recollect, asked me how much he was in my debt; I said one guinea; he said, 'Oh, is that sufficient? Will that satisfy you?' I said 'Yes, sir;' and he took out thirty shillings, a sovereign and a half, from off the bed where he had some money, and said 'Please to accept that;' I thanked him, and sat down and observed to him, 'Well, sir, you knew our old clerk Mr. Twigge, whom we have lost, (I had often heard Mr. Twigge, before his death, speak of the deceased as his respected

friend), and he said, 'Oh, yes,' adding, 'He was a nice, steady, regular man,' in as near as possible those very words; he then said, 'How's your father?' and he continued this little gossip by saying 'I have known him these many years.' I remarked, 'There have been great alterations in front of your house, Mr. Anderson,' alluding to the number of new houses built there, and he said 'Yes; do you remember my garden here before it was altered?' I told him I did not; he said, 'What, not when it was full of herbs?' I said 'No, it was before my time;' I observed his present garden was remarkably neat, and made some observations about the spring coming on, and that I hoped he would get out, but he said, 'Ah! Ah! I don't know, I hope so;' there were a few other light and passing remarks of the same sort, which I now forget, and he held out his hand to shake mine, which I gave him; and we took our leave; he did not shake hands with them. This is all that I recollect that took place. Of the said deceased's testamentary capacity, I have not the smallest hesitation in deposing I did not doubt it for a moment. It was impossible to witness his intelligent look and his cheerful, tranquil manner, and to hear his sensible remarks, and doubt for a moment that he was of sound mind, memory and understanding, fully capable of making his will and doing any act of that nature, requiring thought, judgment and reflection. In consequence of the remarks Mr. Bailey had made about his nervousness, I did not enter on the subject of his will more than I could help; I did not wish to excite him by disturbing his tranquillity, but I recollect the happy, calm, and delightful

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state of the old man was quite the subject of conversation between my clerks and myself as we went home ; it was the theme of admiration to us to see an old man so near his end, (his form was very attenuated) and yet so happy. I did not speak more on the will with him for another reason ; I felt the fullest confidence in Mr. Bailey, and though I do admit that Mr. Bailey said, [that owing to the deceased's ' nervous complaint, he had not spoken to him, my impression was, that there were those persons, Mrs. Baker, for instance, round the deceased, who were in his confidence, and who had conveyed his wishes to Mr. Bailey. His acknowledgment of the will under these circumstances appeared to me sufficient ; I had not any suspicion of fraud, or I should have risked exciting his nervousness by questioning him more closely as to his intentions, and as to the contents of his will, &c."

Lushington, against the will, contended, that there was not sufficient evidence to justify the Court in pronouncing for the validity of the instrument ; where capacity is undoubted, execution is *prima facie* evidence of knowledge of the contents on the part of the testator, unless where the instructions come through an interested party ; here, Mr. Bailey gives the instructions, he being a legatee and an executor in the will. Mr. Drummond never had any conversation with the deceased, as to the contents of the paper, nor was it read over to the deceased, who did not even sign it in the presence of the witnesses. The deceased being an old man, and much attenuated, as the witness says, in bed, and whose death took place ten days after-

wards : it is to be presumed that his mental capacity was failing with his bodily strength.

Addams, contra. From the papers before the Court it clearly appears that the deceased was a sensible man ; it is, however, proved beyond a doubt by the testimony of Mr. Drummond, that he was of a perfectly sound mind ; this will, therefore, be entitled to probate ; and there is no reason whatever for suggesting that Mr. Bailey, a respectable man, would have fraudulently given instructions for the will, to the benefit he takes under it being no more than a hundred and fifty pounds.

SIR HERBERT JENNER.

The difficulty is, that the party opposing the will has left the Court in the dark. How can I, in the absence of all evidence, and looking to the conversation spoken to by Mr. Drummond, conclude that the deceased was not in a fit state to make a will?

Lushington. I will then pray the Court to rescind the conclusion of the cause, for the purpose of adducing proof of the incapacity of the deceased.

SIR HERBERT JENNER.

Such an application must be founded upon an affidavit, stating the grounds upon which you make your prayer.

The following affidavit having been brought in
“ Appeared, personally, Thomas Brown, of
“ Hampstead Road, in the county of Middlesex

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“ florist, party in this cause, and made oath, that,
“ having after the death of John Anderson, the party
“ in this cause, deceased, great reason to doubt the
“ validity of the alleged will of the said deceased in
“ question in this cause, bearing date the 4th day of
“ March, 1837, (of which will he then heard for the
“ first time only,) he instructed his proctor to put
“ the executors of the said will to the proof thereof,
“ by witnesses in solemn form of law, on the part
“ of him the deponent, as one of the executors of a
“ former will and codicil thereto of the said de-
“ ceased. And he further made oath, that in con-
“ sequence of inquiries then made for the purpose
“ of obtaining information for the cross-examination
“ of the subscribed witnesses to the said will, he, the
“ deponent, had great suspicions that the said will in
“ question, or the instructions for the same, had
“ been obtained from the said deceased by some one
“ or more of the parties interested therein, and at a
“ time when he was in a state of great bodily weak-
“ ness and mentally incapable of knowing and
“ understanding the nature and effect of any such
“ testamentary act ; and he, the deponent, was more
“ especially led to believe such suspicions to be well
“ founded, by certain circumstances then made
“ known to him and his proctor, by Dr. Chalmers, of
“ Croydon, by whom the said deceased was attended
“ as his medical adviser for some months prior and
“ down to within three or four weeks of his death.
“ But he, the deponent, was also informed that Mr.
“ Drummond, of Croydon, solicitor, in whose office
“ the said will was prepared, and by whom, with
“ two of his clerks, the same purports to have been
“ attested, is a highly respectable man, and in con-

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“siderable practice as a solicitor, in Croydon,
“he therefore concluded that the fullest informa
“would be obtained from him and his said cle
“on their examination, relative to the instruct
“given for and to the making and execution of
“said will, as well as relative to the mental ca
“city of the said deceased throughout the tr
“action. And he lastly made oath, that it wa
“consequence of such, his expectation of the in
“mation to be obtained from the evidence of
“said Mr. Drummond and his clerks, and of
“the deponent’s disinclination to incur the exp
“of entering into evidence on his part in this ca
“that he instructed his proctor not to give any
“legation therein, on his part, in proof of the f
“and circumstances of which information had b
“obtained as aforesaid, and particularly from
“said Dr. Chalmers.”

Lushington renewed his application to the Court to rescind the conclusion of the cause, for the purpose of enabling his party to adduce evidence of incapacity of the deceased ; the case was a peculiar one, the party opposing the will, knowing Dr. Chalmers’s opinion to be that the deceased was of sufficient capacity to make a will, and knowing that the will was prepared and attested by a respectable solicitor, Mr. Drummond, of Croydon, expected that full information would have been given to the state of the deceased and his testamentary intentions ; but what was the fact ? the instruction came through the party benefited, he being also appointed an executor, and not having himself seen the deceased, but received those instructions from a thi

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party, and that an interested party, the will never having been read over to the deceased, nor even executed by him in the presence of the witnesses; under these circumstances, it would be hard not to allow the party to adduce evidence to shew the real state of the deceased at the time.

Addams, in opposition to the application. The affidavit before the Court sets forth no grounds to justify the present prayer, and if the Court were to accede to the application now made, it may be called upon to do the same thing in every case which may come before it; at all events, should the Court give leave to the party to adduce evidence in the cause, it would be at the risk of costs, and the executors must have an opportunity of contradicting such evidence.

THE COURT.

An application, at the hearing, to rescind the conclusion of a cause, for the purpose of enabling a party opposing a will to adduce evidence of the incapacity of the testator, rejected; the affidavit upon which such application was founded not stating facts which would necessarily lead the Court to the conclusion that the deceased was of impaired capacity.

This is an application of a novel nature, to allow parties to adduce evidence of incapacity, after the cause has been concluded and the evidence seen. But there are peculiar circumstances in this case which induced the Court to listen to the present application. The extraordinary way in which the instructions were given to Mr. Drummond, and the manner in which the execution took place, the deceased not having signed the instrument in the presence of the witnesses, but merely acknowledged his signature. If the conclusion of the cause were rescinded, both parties would certainly be at liberty to adduce evidence, and it would be at the risk of costs on the part of the person making the application.

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What then are the facts? (The Court here read the affidavit and proceeded,) If the party had the suspicions, he ought then to have made further inquiries; he says that he inquired of Dr. Chalmer he, therefore, at that time, had reason for seeking evidence; but he says, that being informed, and believing Mr. Drummond to be a highly respectable man, and in considerable practice as a solicitor, and expecting full information from his evidence, I instructed his proctor not to give any allegation then, as far as appears, Dr. Chalmers gives certain information, but not sufficient to counteract the weight of Mr. Drummond's character and evidence. I am of opinion, upon the statement contained in the affidavit, that it does not follow that the Court would come to the conclusion that the deceased was in such a state of mind as to be incapable of executing his will; I must, therefore, reject the application.

JUDGMENT.

SIR HERBERT JENNER.

The question in this case relates to the will of Mr. James Anderson, who died on the 14th of March, 1837; the will is dated on the 4th of the month, and purports to have been executed in the presence of three witnesses, Mr. William Drummond, a solicitor, and two gentlemen who are his clerks; and there is a codicil witnessed by the same gentlemen. The question is, whether, under the circumstances, there is sufficient evidence that this will is the act of a capable testator at the time of execution?

The will is propounded in a condidit, on which

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the three subscribed witnesses have been examined. There is no plea on the other side; so that the Court has no evidence but that of Mr. Drummond and his clerks.

The deceased was a botanical gardener, at Croydon, growing herbs for physical purposes. He had executed two or three other wills. By one of the 23rd of February, 1836, Mr. Brown is residuary legatee and an executor, and a Mr. Christie has 500*l.*; there were also two codicils to that will, dated the 6th and 8th of October, 1836. By the first of these codicils, the deceased revoked the legacy of 500*l.* given to Mr. Christie; and by the second, he directed his residuary legatee, Mr. Brown, to pay to Mrs. Baker, his housekeeper, fourteen shillings per week for her life. By the present will Mr. Brown is excluded, and Messrs. Goose, Bailey and Lashmar are appointed executors, with a legacy of 50*l.* each for their trouble, in addition to which, Mr. Bailey has a legacy of 200*l.* The residue of the property is given to the sister of the deceased. The codicil, which bears date the same day, gives the plate, linen, and furniture to Mrs. Baker.

It appears that Mr. Drummond was the drawer of the will, and that he received instructions, not from the deceased, but from Mr. Bailey, the executor with a legacy of 250*l.*, and that it was executed, not in the presence of the witnesses, but simply that the signature was acknowledged in their presence: there is no proof of instructions or of reading over the will prior to execution, or of knowledge of its contents, except so far as the acknowledgment of the signature to the instrument. Mr.

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Bailey himself had never spoken to the deceased so that he could not have received instructions from him, but through the medium of another person. The material evidence, and the only evidence in the cause which gives the Court any information, is that of Mr. Drummond, the solicitor, who drew the instructions from Mr. Bailey; the two other witnesses are young gentlemen, who are not able to give much information. Mr. Drummond says there is no person acquainted with the deceased, who in his late years had lived very retired. He (the witness) knew Mr. Bailey to be a steady, upright person. The result of Mr. Drummond's evidence is, that he believes the deceased to have been in a perfect state of testamentary capacity. Mr. Drummond would have done better if he had informed himself as to the deceased's knowledge of the contents of the will; yet I cannot say he has stated anything whatever which goes to shake the capacity of the deceased, or to lead the Court to suppose that when he acknowledged his signature, he did not mean to give force and effect to the instrument. If there was any reason to doubt the capacity of the deceased, the Court would have required further evidence. When the papers were first read by the Court, it did seem an extraordinary transaction and one which required to be examined with considerable minuteness; but upon a further consideration of the case, I am satisfied that Mr. Drummond's evidence is sufficient to support the act of a capable testator, there being nothing to lead me to suppose that the deceased's mental faculties were affected. I, therefore, pronounce the will, but decree Mr. Brown's costs to be paid out of the estate.

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A person (a solicitor) produced as a witness, by the executors who propounded a will, having admitted that he retained their proctor in the first instance, and was responsible to him for his bill of costs, held to be an incompetent witness on their behalf.

This was a cause of proving in solemn form of law, the last will and testament of Mr. John Edwards, who died on the fifth of October, 1835. The will was propounded by the executors, and was opposed by Mr. William Edwards, the nephew and next of kin of the deceased, on the ground of incapacity and undue influence. At the hearing of the cause an objection was taken by the counsel for Mr. Edwards to the competency of Mr. Joseph Parkes as a witness, on the ground of his being interested in the result of the suit. He had been examined on behalf of the executors, and was the principal witness in support of the will. The objection was founded upon his answer to the sixty-third interrogatory, in which he stated that, "the proctor for the producents was retained by him, to conduct the cause on their behalf, that he did by such retainer become responsible for the payment to the said proctor of his bill of costs or expenses in this cause."

Lushington, in support of the objection. The question is, whether a liability for costs on the part of the witness, (Mr. Joseph Parkes,) constitutes such an interest as will disqualify him from giving evidence in the cause?

THE COURT.

Is it admitted that he is legally responsible to the proctor?

The Queen's Advocate.—No, we do not admit it.

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Lushington.—Mr. Parkes having stated in answer to the fifth interrogatory, that he acted as solicitor for the producents, says, in answer to the sixty-third interrogatory: "The proctor for the producents was, in the first instance, retained and employed by me to conduct the cause in their behalf; I did by such retainer become responsible for the payment to the said proctor of his bill of costs or expenses in the cause." Then he gave his evidence, under the impression that he was liable to pay the costs in the cause, and it might be contended, that this would disqualify a witness, on the ground of supposed interest, but assuming it to be otherwise, was he not under a legal responsibility? In the first place, the witness admits that he is legally responsible; Secondly, how can his legal responsibility (he having retained and employed the proctor) be denied? Is not every man liable for the expenses incurred in a work or business which he directs to be done? Is not a solicitor in the same situation? There can be no doubt that a liability for costs results from such a circumstance. He further answers, "I have not since in any way been released from such my responsibility. In case the producents should be unable to pay the amount of the said proctor's bill, I will not venture to swear that he, the proctor, would not have any remedy at law or otherwise against me for the recovery of the amount of his said bill, but, it is evident that the responsibility is merely nominal." It is immaterial whether he considers it nominal, for this reason: If I become responsible for the costs in a cause, it may be true,

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that another person may be responsible over to me, and he may be an individual of enormous wealth, but I am responsible in the first instance, and the individual responsible to me may be worth ten thousand pounds one day and nothing another. Mr. Parkes has rendered himself liable for the costs in the first instance, and is, therefore, interested in the result of the suit; for on the result of the suit may depend the amount for which he is liable: So that he has a direct legal interest in the cause.

The authorities in Courts of Common Law are clear upon the point, and what is infinitely more material, the same rule prevails in Courts of Equity, not because one is more of an authority than the other, but because the proceedings in Courts of Equity are more analogous to our proceedings, the mode of taking depositions being precisely the same.

First then, as to cases in the Courts of Law. In *York v. Gribble*, (a) a person who had made himself liable to the attorney for the costs of the action, was considered incompetent as a witness, without a release. In *Parker v. Vincent*, (b) the witness had instructed the attorney to go on with the action, which, it was held, rendered him liable to the costs, and Lord Tenterden rejected his evidence. Mr. Parkes has done more; he instructed the proctor to begin the suit. In *Rex v. Newland*, (c) the same principle was acted upon, and Mr. Baron Perryn said, "If a witness admits himself to have an interest, whether he has an interest in fact or not, yet the belief of it has an equal operation on his mind; and in either of these cases, it would be an objection to his testimony;"

(a) 1 Esp. 319.

(b) 3 Car. & P. 38.

(c) 1 Leech, C. C. 311.

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and it was stated in that case on the authority of *Rex v. Woolridge*, in 1784, that "a master cannot maintain the suit of his servant; but if he has knowledge that he is under an honorary obligation to pay his costs he cannot be examined in his capacity as a witness."

In *Bell v. Smith*, (a) the witness had rendered himself liable to the attorney for the costs, and the Court of King's Bench held that he was incompetent on that ground,—so much for the authorities of the Courts of Common Law.

I will now refer to a case in the Court of Chancery, which entitles me to say that the same rule is completely settled there. It is a decision of Lord Eldon, than which I need not state there can be a higher authority, and it was made under circumstances which called for careful attention and a vast deliberation. The case is that of *Vaughan v. Worrall*. (b) The observations of the Lord Chancellor were as follows: "There is no doubt that in late years, Courts of Justice have struggled to convert objections to the competence of a witness into objections to credit; and recent decisions (which though it is difficult always to understand the grounds, are substantially right) establish this, that if the witness has no interest in the event of the cause, though his answer to the questions may be evidence for or against him in another cause, that is not an objection to his competence; but I have never known that doctrine applied to a case in which a bill has been filed in this Court, and the witnesses have engaged to pay the costs of the proceedings; there neither the plaintiff nor the w

(b) 5 Barn. & Cress. 188.

(c) 2 Swanston, 395.

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THE COURT.

In that case, was the party interested in respect to the costs of the other party?

Lushington.—It does not appear. But what is the principle as to the competency of witnesses on the ground of interest? Has he, or has he not any actual legal interest in the result of the cause? That is the true principle, and it is impossible to fix any standard of the amount of interest which shall create bias or operation on the mind of a witness, with reference to his situation in life. If he has an interest of eighteen pence he cannot be a witness: he is completely disqualified. Mr. Parkes tells the Court he has an interest, that the result of the suit may occasion loss to him, and if it may be the effect of the suit to expose him to pecuniary loss, it is the nature of man to endeavour to avoid it: the evidence of a person is altogether rejected if he be interested directly, though in the remotest degree, and be the amount of interest ever so small.

But what has been done in our own Courts? In a variety of cases, the same doctrine has been acted upon, that a liability to costs renders a person incompetent as a witness. In *Hudson v. Beauchamp*, (a) a motion was made to compel a witness, who had been examined on behalf of Hudson, one of the parties in the cause, to answer explicitly to an interrogatory (which he had refused to do,) whether he was or was not responsible for the ex-

(a) 1 Add. 352.

penses of the suit. What was the decision of the Court? "I think that the witness is bound, and may be compelled to answer the interrogatory in question explicitly; and, consequently, I direct the monition to issue as prayed." Why should the Court have been pressed to require an explicit answer? To shew that if the witness was responsible for the costs, he was incompetent.

There is also the case of *Cooper v. Kempton*, in 1808, before Sir W. Wynne, (not reported) in which, according to my note, the Judge himself took the objection, and refused to allow the evidence to be received.

THE COURT.

I have been furnished with Dr. Arnold's note of that case, but it does not appear whether the Judge took the objection or the counsel. One of the witnesses had agreed to pay a small sum towards the expenses in the cause; it does not appear that he had a direct interest in the suit, and the Court said (according to the note before me), "clearly incompetent." And there is a case in 1745, where a witness had promised to pay the proctor and had paid money, and he was rejected. So far as Dr. Arnold's note goes, the witness was considered incompetent.

Lushington.—And on the ground of his being liable for costs.

THE COURT.

It should seem so.

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Lushington.—There is another case, which shews that this Court, where a witness acknowledges himself to have any interest whatever, has declined to receive his evidence. The case of *Sudyer and Sudyer against Man*, (a) before Sir George Lee, where a witness had been examined in support of a will under which he took a ring. Sir George Lee directed the deposition to be suppressed, and that the witness should renounce, or be paid his legacy and be re-examined. It was, therefore, the invariable doctrine of these Courts at that day, as subsequently, that the slightest interest in the result of the suit disqualifies a witness.

Cooper v. Derriennic (b) goes to establish the position that in any case, even though the result is uncertain, a direct interest will disqualify. In that case William Giles had been examined in support of a will, under which he had a legacy of 300*l.*, but the legacy had been paid to him by order of the Court of Chancery; and his interest could by no possibility be affected unless the will had been overturned, and the executors commenced a suit to recover the legacy as paid in error in point of law, or he should be called upon for a rateable proportion of the costs; yet it was an interest depending on the result of the suit, and the Court allowed him to be reproduced and resworn only on a release. A similar case is mentioned in the note to the report.

THE COURT.

There is the case of *Salmon v. Cromwell*, in

(a) 1 Cases before Sir G. Lee, 159.

(b) Hagg. E. R. 482.

1820, where Sir John Nicholl held a witness competent.

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Lushington.—In considering a point of this kind, we should look to decided cases that are reported, to see whether the Court was in possession of all the necessary information, before it determined the point.

The Queen's Advocate.—In *Salmon v. Cromwell*, the objection was made to the evidence of a witness, who, on interrogatory, admitted he was liable to the proctor for the expenses of the suit; but the judge overruled the objection.

Lushington.—In that case, although the party may have considered himself responsible to the proctor, that might have been his opinion only, and it is a nice question whether the judgment of the individual is to disqualify him.

THE COURT.

The note before me says, that the judge admitted the evidence, because the witness had no interest in the suit. "The case is different," he says, "where a party has entered into an engagement to pay a part of the costs;" so that it would appear that he was not responsible for the costs.

Lushington.—He might not have been responsible; here is a legal responsibility. The only points are, whether Mr. Parkes has a legal interest: and whether the Court can receive the evidence of a

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Addams, on the same side.

The witness has admitted that he is legally liable to pay the proctor's bill, and if he is so liable, then he is not a competent witness.

In all the cases up to *Salmon v. Cromwell*, it has been held that a legal liability for costs renders a witness incompetent. All the decisions in the Courts of Common Law and Equity are to the same effect. Then it comes to this, whether that single case is to ride over all preceding decisions. The doctrine of that case was not adopted by the Court of Admiralty in the case of "*The Harvey*," (a) in 1827. That was a case of serious hardship, and not a case in which to take such an objection, and the party objected to was almost a necessary witness; for there was hardly any one able to prove the case but himself, still as he was liable for the costs Lord Stowell rejected the evidence.

THE COURT.

He was liable to all the costs of the cause perhaps of both parties; this case does not come up to that.

Addams.—Can it be said that, on the result of Mr. Parkes's evidence, it may not depend whether the adverse party shall be condemned in the costs? If the condemnation of the adverse party in the costs depends upon his evidence, he has a strong

(a) 2 Hagg. Adm. Rep., page 83, note.

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interest in the suit, for by his evidence Mr. Edv may be condemned in the costs, or the will may be pronounced against, and the executors may be condemned in costs. They may be able to discharge a small sum, but not a large sum. But if there is a primary liability, the witness is disqualified from giving evidence.

The Queen's Advocate, contra.

It appears to me an extraordinary position to take down, that if Mr. Parkes is under any contingency in the slightest degree liable to any part of the expenses of this suit, it is sufficient to vitiate his testimony. But first, is Mr. Parkes in reality responsible for those expenses? There is this great distinction between the cases, cited in the Common and Equity Courts and the present case, that in those cases the parties made themselves responsible for the costs generally, not only of their own party but of the other side, if condemned in costs, which gave them a direct interest in the suit, for not only does it disqualify a witness but a *direct* and *certain* interest in the event of the suit. In this case, whatever way the suit is decided, Mr. Parkes, according to his own opinion, may be responsible to the proctor whom he retained, in case the party with whom he is agent he is shall be unable to pay.

THE COURT.

That is not quite the effect of his answer; he says he is responsible.

The Queen's Advocate. If he retained the proctor, and his party is unable to pay him, the proctor

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would have a remedy against the solicitor. But the parties are responsible to the proctor also, though Mr. Parkes may be responsible, and that would be the case whichever way the cause was decided. There is nothing dependent upon the event of the suit, his liability is the same on that side, and that side only. There is a responsibility on one side only, and only in the event of the party being unable to pay; the responsibility, therefore, is merely nominal.

THE COURT.

May it not still be his interest to make as favourable a representation as he can?

The Queen's Advocate. It would not alter his responsibility. In *York v. Gribble*, the witness had employed the attorney and rendered himself liable for costs, by which, I understand, the costs of the action; a release was taken and the witness was examined. But there was no discussion of the principle in that case, which was in 1795, and there are later cases of a different tenor.

In *Birt v. Kershaw*, (a) the marginal note is, "An indorser on a note who has received money from the drawer to take it up, is a competent witness, for the drawer in an action against him by the indorsee, to prove that he had satisfied the note; being either liable to the plaintiff on the note, if the action were defeated, or to the defendant for money had and received, if the action succeeded; and his being also liable, in the latter case, to com-

(a) 2 East, 458.

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pensate the defendant for the costs incurred in the action by such non-payment, makes no difference.” Lord Ellenborough said, “It appears to me, in a very simple and clear view of the case, that the witness stood indifferent between the parties. He must either be liable to the plaintiffs as indorsers of the bill, or to Kershaw, for the money received by him in order to discharge it. It is true, that in the latter case, if these plaintiff’s recover, he may also be liable to Kershaw for the costs of this action: but that argument was urged in *Ilderton v. Atkinson* without effect.” This was in 1802, seven years after *Yorke v. Gribble*. In *Ilderton v. Atkinson*, (a) referred to by Lord Ellenborough, the marginal note is, “If A. have received money from B. to pay to C., and the question be, whether A. were the agent for C. for that purpose, A. may be called as a witness to prove the agency.” On the trial, the question was, whether one Barber were a competent witness? He had been the agent of the plaintiff, and, as asserted by the defendant, continued to be so at the time when he received a sum of 200*l*. (the money in dispute) from the defendant, and received the money in that character. The plaintiff admitted the receipt of the money by Barber, but denied his agency at the time of the receipt. The defendant called Barber to prove the agency, but he was objected to on the ground of interest: it was said by the defendant’s counsel, that his interest was equal, either way, and, therefore, that he was admissible; against his admissibility, it was argued that Barber’s interest was stronger in favour of the defendant,

(a) 7 T. R. 480.

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because the defendant would be entitled to recover the costs of that action, as well as the money itself from Barber, if Barber had received the money under a misrepresentation of his own character, and Mr. Baron Thompson rejected the witness: but upon a motion to set aside the verdict, the Court were of opinion, "that the objection to the admissibility of the witness was not well founded, because, in any event, the witness stood indifferent in point of interest between the parties, being liable either to pay the money received to the plaintiff, or to refund it to the defendant." That if such an objection as the present were to prevail, it might exclude brokers who had effected policies of insurance; and that it would be difficult hereafter to draw any certain line."—A broker, therefore, may be called to give evidence, and so, I submit, ought to be the case with a solicitor, who is almost a necessary witness, being the drawer of the will.

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There is a much later case, (1834,) *Doe v. Allbutt*, (a), in which a witness was called, who had made himself responsible for costs, and the attorney executed a release, discharging him from all "fees, costs, and charges." Baron Gurney held that the release was sufficient, and the witness was examined. It was thus assumed, that the party being liable, was disqualified without a release.

The Queen's Advocate. The cases in the Common Law Courts seem to be conflicting, but the decisions

(a) 6 Car. & P. 131.

pensate the defendant for the costs incurred in action by such non-payment, makes no difference. Lord Ellenborough said, "It appears to me, in a very simple and clear view of the case, that the witness stood indifferent between the parties. He must either be liable to the plaintiffs as indorser of the bill, or to Kershaw, for the money received of him in order to discharge it. It is true, that in the latter case, if these plaintiffs recover, he may also be liable to Kershaw for the costs of this action: that argument was urged in *Ilderton v. Atkinson* without effect." This was in 1802, seven years after *Yorke v. Gribble*. In *Ilderton v. Atkinson*, referred to by Lord Ellenborough, the marginal note is, "If A. have received money from B. to pay to C., and the question be, whether A. were the agent for C. for that purpose, A. may be called as a witness to prove the agency." On the trial, the question was, whether one Barber were a competent witness? He had been the agent of the plaintiff and, as asserted by the defendant, continued to be so at the time when he received a sum of 200*l.* (the money in dispute) from the defendant, and received the money in that character. The plaintiff admitted the receipt of the money by Barber, but denied the agency at the time of the receipt. The defendant called Barber to prove the agency, but he was rejected to on the ground of interest: it was said by the defendant's counsel, that his interest was equal either way, and, therefore, that he was admissible against his admissibility, it was argued that Barber's interest was stronger in favour of the defendant.

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who overruled it, and admitted the evidence, and upon that evidence the will was supported.

Phillimore, on the same side. The proposition contended for by Dr. Lushington is an alarming one, and if adopted will have the effect of altering our practice. I deny that in Courts of Common Law there is an unbending rule; Mr. Phillipps and Mr. Starkie say there are exceptions to the rule. Should not this case be an exception?

Mr. Parkes was the drawer of the will, and is a subscribed witness; he was the confidential solicitor of the deceased, and the depositary of his testamentary intentions. According to my view, Mr. Parkes was (in the sense in which Mr. Justice Buller uses the term), a necessary witness in the cause. It is impossible that the Court can come to a conclusion satisfactory to its own mind, without the essential evidence of this witness. What does he in effect say? "I am the agent *quod hoc* of the executors; I employ the proctor, and consequently he has a remedy against me in the first instance, and I have a remedy against them." Before he is liable to the costs, we must presume inability in the parties to pay them. It is not a direct responsibility, it is a remote responsibility, which, in all Courts, stands upon grounds distinct from direct responsibility. A witness who gains by the direct result of the case is incompetent; but writers state that there are exceptions to that rule. Some witnesses, *prima facie* incompetent, are rendered competent by act of Parliament; others are competent from necessity; others from principles of public policy. The objection to competency, on the ground of interest, pro-

ceeds from a supposition of too great a bias on the mind of the witness, and it is the great interest of the public to obtain pure testimony; but the public interests may suffer more from rejecting evidence than from receiving it. The inclination of all Courts is to let a witness be examined, and to deduct from his credibility. Lord Mansfield, who was imbued with the doctrines of the Civil Law (by which hardly any interested witness was excluded) favoured this principle. The rules of evidence adopted in our Courts of Law are repudiated to a great extent by many nations, and are held to be the greatest blot upon our system of jurisprudence. Our Courts are infinitely more lax and liberal in their principles, being founded upon the doctrines of the Civil Law, and are not bound down by those of the Common Law Courts. In *Abrahams v. Bann* (a), which was an action for an usurious contract, tried by Lord Mansfield, a motion for a new trial was founded upon the alleged incompetency of a witness for the plaintiff, the borrower of the money, who was called to prove the usurious contract. Lord Mansfield delivered the judgment of the Court, in which, after referring to certain cases, particularly that of *Bailie v. Wilson*, before the Delegates, he says,—“The solemn discussion, in these three cases, drew the line between *interest*, which goes to the competence, and *influence*, which goes to the credit, more clearly than had before been understood. It established a rule, ‘that where the matter was doubtful, the objection

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shall go to the credit.'” The witness in that case was held competent.

Phillipps lays down the rule broadly, yet he says there are exceptions to it, as respects responsibility for costs. Starkie lays it down, that an engagement to pay the costs constitutes a disqualifying interest. There is no engagement here: the party must be directly responsible; he must have an interest in the result of the suit; where the interest is doubtful the objection goes to the credit and not to the competency of the witness. Starkie, referring to *Carter v. Pearce* (a), says,—“The interest must be a present, certain, vested interest, and not uncertain or contingent.” The general result of the Common Law cases is, that a direct and certain interest must be shown; a less interest will go, not to competency but to credit only.

In the *Catherine of Dover*, in the Court of Admiralty (b), where an objection was raised to the competency of a witness, on the ground of interest, the Court said: “In a case of doubt it would be disposed to admit rather than exclude the evidence.” “Objections to competency, on the ground of interest, are sustained in order that evidence may be obtained free from bias; but if to effect this the Court excludes the only proof that can be offered by the defendant, the principle is destroyed, by transferring the bias to the other side, and by hearing the case on *ex parte* evidence alone.” In the present case the evidence, without that of Mr. Parkes, will be *ex parte* evidence. The Court added: “If

(a) 1 T. R. 163.

(b) 2 Hagg. Adm. R. 145.

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evidence could have been produced from the gall on one side or the other, I certainly should have admitted witnesses liable to this objection interest; but the necessity of the case justifies exception; and this is the ground of my judgment. That ground of exception is recognized in all books. Mr. Justice Buller, in his *Nisi Prius*, states "as the third exception, under the general rule that a party interested will be admitted where other evidence is reasonably to be expected." And in the *Pitt* (inserted in a note to the report of the preceding case), the Court admitted the evidence of witnesses who were interested, as plaintiffs, at the costs, observing that such witnesses may be examined in some cases *ex necessitate rei*; that the Court always endeavours to exclude biassed witnesses, but it must sometimes admit them."

In *Sudyer and Sudyer v. Man*, the witness was a legatee.

The fair result of the cases, though they are not without difficulty, is, that the Courts struggle to admit evidence, and in doubtful cases favour admission. The case of *Salmon v. Cromwell*, in which such evidence as this was admitted, after great deliberation, is a case absolutely in point.

Lushington, in reply. My learned friend cannot be serious in his exposition of the doctrine of evidence, according to which, if the evidence be material, the Court will admit it, whether the witness is interested or not; that the Court is to decide whether the evidence be material, and has then the power to dispense with the rule. The Court has no such power, and no Court ought to be arm

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with such authority. The question, whether the witness is interested or not, is a distinct point, with which the discretion of the Court has nothing to do. Then, who are necessary witnesses? Not the drawer of a will, or the attesting witness to a will. A necessary witness is one to a transaction to which no one else can be privy. Then it is said that, in case of doubt, all Courts lean to the admission of evidence, but there is not a shade of doubt here—the witness admits his interest.

The case in *Burrow* shews no more than that whereas, prior to the judgment in that case, Courts of Law had held that not only every witness who had an interest in the *suit* should be excluded, but any one who had an interest in the *question* was disqualified. Lord Mansfield examined the distinction, and it was held, for the future, that exclusion, on the ground of interest, should be confined to those who had an interest in the result of the suit itself, not in the question.

It has been contended, that a liability for costs will not disqualify unless it be for costs on both sides. There is no authority for such a distinction; there is no principle for it. The ground of disqualification is the interest, however small it may be.

In *Salmon v. Cromwell*, the whole decision went upon the answer of the party, that “he considered himself responsible.” But, although I admit the weight of this decision, I oppose to it that of Lord Stowell, in the *Amitié*, (a) where the evidence of a witness was excluded who was biassed in fact, though not in law.

(a) 5 Rob. 344, in the note.

It is now said, in spite of the decision in *Vaughan v. Worrall*, that this Court is not to be bound by such rules, but may adopt its own notions of what is convenient in particular cases. If we repudiated the principles of evidence adopted in Courts of Common Law and Equity, we should get rid of no blot, but reject one of the greatest advantages to the jurisprudence of any country—that of having certain rules of evidence, not depending upon the discretion of this or that judge. The rejection of Mr. Parkes's evidence will put an end to an injurious practice, where the solicitor, who prepared the will, not only conducts the suit and examines the witnesses, but makes himself responsible for the costs of the proctor; whereby his passions and feelings are excited, and his evidence is rendered unworthy of credit.

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JUDGMENT.

SIR HERBERT JENNER.

The question which the Court has now to decide is, whether Mr. Parkes, a solicitor, who is the drawer of the will propounded in this cause, and one of the subscribed witnesses, is a competent witness to prove the execution of it. The objection to the competency of this gentleman is founded on his answer to the sixty-third interrogatory, in which, as it is argued, he has admitted himself to be liable to the proctor in the cause for his bill of costs. It is contended that by this responsibility he is disqualified from being examined as a witness in support of the will. On the other hand, it has been contended, that Mr. Parkes is not legally responsible for the costs by what he has stated in his answer to

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the interrogatory ; that he has no interest in the result of the suit, and consequently that he is a competent witness, whatever deduction may be made from his credit, in consequence of his having employed the proctor, and admitted himself to be, to a certain extent, responsible for the costs.

This question has been argued with great zeal and ability on both sides,—the counsel on both sides, probably feeling that the question, as to the validity of the will, must depend on the manner in which this question shall be decided.

The competency or incompetency of Mr. Parker to be examined as a witness in this case, depends upon the question, whether he had a legal interest to support the cause of his clients ; and in the course of the argument, the Court was referred to a variety of cases that have occurred in the Courts of Equity and Common Law, and in proceedings at Nisi Prius, and also to one or two cases which have been decided in these Courts, in which the question, as to the competency or incompetency of witnesses had been very much discussed. It is unnecessary for the Court to travel with very great minuteness through the facts of the cases referred to, for they are not very material : the question has been, whether, if a witness was responsible for costs, it was or was not an objection to the credit or competency of the witness ? and in a variety of cases, very nice distinctions have been drawn between objections which go to the competency, and those which go to the credit of the witness ; but I think the general result of the cases to be this, that where a witness is legally responsible for the costs, that operates as a disqualification to be examined in

support of the cause, for the expenses of which had rendered himself liable. The question, therefore, at present is, whether Mr. Parkes, in the instance, is or is not legally responsible for costs: because, I think, according to later better decisions, it is not a mere imaginary responsibility, not a mere honorary obligation to pay costs, that will disqualify a witness to be examined in a particular cause. Whatever may have been the decisions in earlier times, and in the cases referred to in the Court of Admiralty; in later days it has been held, that, in order to make a witness incompetent, there must be a legal responsibility, and an interest in the matter in dispute. This is laid down strictly by Mr. Phillipps and Mr. Starkie in the Law of Evidence, and it is expressed in the clearest, most intelligible, and most convincing terms by the latter writer: "The interest to disqualify, must be some legal, certain, and immediate interest, however minute in the *result* of the cause or in the *record*, as an instrument of evidence acquired without fraud. In the first place, it must be a legal interest in the event of the suit or in the record, contradistinguished from mere prejudice or bias, arising from the circumstance of relationship, friendship, or any other of the numerous motives by which a witness may be supposed to be influenced." "If a party be really interested in the event of a cause, he is not competent, although he does not apprehend that his interest is a legal one; for it would be exceedingly dangerous to violate this general rule, because the witness does not understand his legal responsibility. If a witness supposes that he is under an *honorary*, though not a *legal* engagement,

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ment, as to indemnify the bail, he is still competent, for he is under no binding engagement, and it would be highly inconvenient to make competency, in such cases, to depend on the witness's notions of propriety, and it would savour of inconsistency to found a suspicion of his veracity upon a just and honorable feeling." (a) And the case of *Parken v. Whitby*, (b) is, I think, a sufficient authority to shew that there must be a legal responsibility, and not a mere honorary obligation, which a witness may consider himself to be under.

Now, the first thing to be considered is, whether Mr. Parkes is legally responsible to the proctor for the costs in this suit, and in order to arrive at a just conclusion on that point, it is necessary to read, not only the answer to the interrogatory, but the interrogatory itself, in order to determine the effect of the answer, the whole of which must be taken together. The interrogatory is to this effect: "Let the said Joseph Parkes be asked, was not the proctor for the producents, in the first instance, retained and employed by you to conduct the cause on their behalf? Did not you by such retainer become responsible for the payment to the said proctor of his bill of costs or expenses in this cause? Have you since, in any way, and if yea, when and in what way, been released from such your responsibility?" The answer is to this effect: "The proctor for the producents was, in the first instance, retained and employed by me to conduct the cause in their behalf. I did by such retainer become responsible for payment to the said proctor of his bill of costs,

(a) Starkie, vol. 2, pp. 744, 755.

(b) 1 Turn. & R. p. 372.

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or expenses in the cause. I have not since in any way been released from such my responsibility." As far as I have read, the answer states an absolute and unqualified admission that Mr. Parkes had retained and employed the proctor, and was responsible to him for his bill of costs, and that he had not been released from this responsibility; and if the interrogatory had rested here, there could be no doubt that he was under a legal responsibility; he might have been indemnified and released from liability; but there is no release, and Mr. Parkes was legally responsible, though other parties might also be responsible. But the interrogatory goes on: "In case the producents should be unable to pay the amount of the said proctor's said bill, will you venture to swear positively, that he (the proctor) would not have any remedy at law or otherwise against you for the recovery of the amount of his said bill?" Mr. Parkes answers: "In case the producents should be unable to pay the amount of the said proctor's said bill, I will not venture to swear that he (the proctor) would not have any remedy at law or otherwise against me for the recovery of the amount of his said bill; but it is evident that the responsibility is merely nominal, as far as I am concerned."

Let us see what is the true construction of these answers, and the purpose for which the Interrogatory was framed. He admits that he is responsible to the proctor for his bill of costs in the cause; and there is no doubt, that if the examination had been *vidæ voce*, it would have gone no farther than to have asked Mr. Parkes, whether he had any release from his responsibility. But as the answers of the

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witness to the first part of the Interrogatory could not be known to the other party, it was necessary to probe the witness farther, in order to meet the possibility of an answer not admitting his liability; and accordingly, the Interrogatory, in effect, proceeds upon a supposition that he had denied his responsibility to the proctor; and it goes on, in effect to ask, "If you are not generally responsible for the proctor's bill of costs, will you swear you are not in a limited degree liable, that is, if the executors should not pay the proctor, must not the costs be paid by you?" And he admits this; but this is not any qualification or limitation of his own responsibility, for he had admitted before that he was responsible to the proctor. I am of opinion that Mr. Parkes was, according to his own admission, responsible to the proctor for the costs, and it was the necessary legal consequence of his act, and as he has not had any release from that responsibility, it still exists.

The next question is, what is the effect of this legal responsibility? Does it affect the competency of the witness, or his credit only? I have stated, that in many of the cases referred to, there were nice distinctions between objections which go to competency and those which go to credit only; but it is necessary to consider those distinctions here, for I am not aware of any case, except one (to which I shall advert), in which there was any doubt as far as decisions in Courts of Common Law go, that a responsibility to answer costs in an action would be a disqualification of a witness. It is laid down expressly by writers on the Law of Evidence, Mr. Phillipps and Mr. Starkie, that a responsibility for

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the costs, or any part of the costs, constitutes such an interest as disqualifies a witness; and this rule appears to be supported by so many authorities (which were referred to in the argument) that it would be a waste of time to go minutely into a consideration of the subject. It was, indeed, admitted in argument, that there was a rule laid down to that effect and supported by authorities; but it was contended that, in some of the cases, the costs, for which the witness was responsible, included the costs of the other party, and that the result of the cases shewed that there must be a liability for the costs of both parties to work a disqualification. But this is not the case in *York v. Gribble*, or in *Doe dem. Dully v. Allbutt*, (a) where the responsibility does not go beyond the costs of the attorney to the party for whom the witness was called to give evidence. It was admitted in those cases, that the rule was general; that it was an universal rule, that a person, responsible to the attorney who conducted the cause for the party in whose behalf he was called, was disqualified.

Both these cases, it is true, were decisions at *Nisi Prius*, but it can hardly be said that they were decided without much consideration. There could be no misunderstanding of the law, applicable to the case, for there was no question as to the rule of evidence; the only question was, whether the release tendered was sufficient?

But there is another case, which was not a decision at *Nisi Prius*; but an application to the Court of King's Bench for a new trial, in consequence of a misdirection of the Judge at *Nisi*

(a) 6 Car. & P. 131.

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Prins; this is the case of *Bell v. Smith*, (a) in which one of the grounds of objection to the competency of a witness was, that he was responsible to the attorney, employed to commence the action, for the costs; and Abbott, C. J., said: "If the action was brought by his authority, either express or implied, he became liable to pay the attorney employed to bring it; and he is still under that liability, nothing having been done to deprive the attorney of his right to recover his costs from him." Bayley, J., said: "The attorney employed to bring the action has a claim upon the assured for his costs." The other Judges, Holroyd and Littledale, concurred, and a new trial was granted, this being a decision of the Court of King's Bench, that a witness, responsible to the attorney in the action for his costs, is disqualified. I do not understand that there is any case adverse to this rule.

The case of *Vaughan v. Worrall*, cited in argument, seems to shew that the same rule is applicable in Courts of Equity, and that there a person responsible for costs would be considered an incompetent witness. Then I cannot help thinking that this is a general rule in Courts of Common Law and of Equity, and I am not aware that there is a different practice in these Courts; I do not think I am at liberty to say that, in these Courts, other principles of evidence are understood to prevail than in the Courts of Common Law and of Equity. It has been urged in argument, that these Courts are more lax in respect to those principles than other Courts. It may have been so, perhaps, formerly; but I must relieve this Court from the

(a) 5 Barn. & C. 188.

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imputation that, at this time, it adopts other of evidence than other Courts, since in all the same principles are applicable, though may be different modes of application ; and I wish it to go out to the world that a greater degree of laxity prevails in the proceedings of these Courts than in those of other Courts. I apprehend the same principles apply to these Courts as to other Courts, though the different modes of procedure may admit sometimes of a difference of application. These Courts have endeavoured to conform, as possible, to the principles adopted in other Courts.

No cases were referred to in the argument which this point had been directly decided in other Courts. *Hudson v. Beauchamp* was a case in which the point was not expressly determined, but turned out, on re-examination, that the witness had been responsible for costs at his first examination, when, on his refusal to answer an interrogatory, re-examination was directed; but I think the reason to collect, from the manner in which the objection was pressed and received, that if he had stated, at the former examination, that he was responsible for costs at the time the first examination took place, the Court would have rejected the evidence ; but as it did not so turn out, the evidence was received.

The case of *Salmon v. Cromwell* is considered more to the point than any other adverted to in the later proceedings of the Court ; and it does appear that Mr. W. H. Salmon, who was the attorney for the cause, stated that he had taken an indemnity from the parties for whom he appeared, but that

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considered himself liable for the costs if the other was unable to pay. The objection was, that the indemnity did not render him competent; that the person granting the indemnity might not be able to pay the amount, and that he was, therefore, incompetent in law—that was the objection; and the learned Judge (my predecessor) who decided the case, did receive the evidence of Mr. Salmon, and, therefore, he considered it as no objection to the competency of the witness that he had employed the proctor, and was responsible to him for the costs. The note I have of what the learned Judge said is this: “I admit the evidence of Mr. Salmon. The cases cited are not against it (*Cooper v. Kempton*, 1808, *Ward v. Parker*, 1745). He says he is the attorney of the producent, but there was no engagement between them; he has no interest in the suit. It is very different where the party has entered into an engagement to pay part of the costs, and where he considers himself liable for the costs of the other party, that is very different.”

This case of *Salmon v. Cromwell* is the only case in these Courts which seems to go contrary to the universal rule in the Courts of Common Law and of Equity; and if this case had been followed up by others of the same kind, it might be necessary for this Court to hold that the principle and practice of these Courts had not been assimilated to those of the other Courts. But it is too much to attribute such weight to this single case as to make it overrule the doctrine which has always obtained in other Courts, and more particularly when I find that there are cases, which were mentioned in the argument, in which such evidence had been re-

jected. In *Cooper v. Kempton*, in the Prerogative Court, February, 1808, where the objection was raised, the evidence was rejected, the Court holding that the witness was incompetent. And in the case of *Ward v. Parker*, in 1745, where the witness was responsible to the proctor for his costs, his evidence was rejected. So that it appears that the doctrine of these Courts is conformable to that of the Courts of Common Law; and with respect to the case of *Salmon v. Cromwell* (which was decided at the moment, without consideration, and in which there seems a distinction drawn between cases where the witness considered himself liable, and actual legal liability), I do not think that that case should form a rule for these Courts, all the other Courts adopting a different principle.

Therefore, I consider in this case that the witness, having been originally responsible for the costs, and being still responsible, as he has not been released from his liability, is not a competent witness to be examined in support of the will, and I am under the necessity of rejecting his evidence, as of a person having, in the contemplation of law, an interest in the result of the suit.

But it has been argued that, although the general rule is to this effect, it is not an inflexible rule, and that cases have occurred in which witnesses, having a direct interest, have been permitted to be examined, and that these cases form an exception to the rule, on account of the necessity of the case, and that in such cases witnesses having a direct interest may be examined. But it must be shewn that there is an absolute necessity that the witness should be examined, and not a necessity in any

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result not from the accidental failure of evidence
in a particular and isolated case, for it would be
highly impolitic to sacrifice a general rule in order
to alleviate a particular hardship, but it must be
general in its nature, embracing a large and definite
class of cases, and it must arise in the usual
and natural course of human affairs." And he
goes on to say: "It is to be remarked, that the
law has justly been jealous of any extension of this
rule, and that its operation has consequently been
very limited in practice."

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Now certainly the drawer of a will, although in
all cases an important witness, is not a necessary
witness, and cannot be considered a necessary witness.
In this particular case he may be a necessary
witness to prove this will, but he is not a necessary
witness in the usual legal acceptation and meaning
of the term. Mr. Parkes is undoubtedly an important
witness; he is the drawer of the will; he received the
instructions from the deceased for the preparation of the
will, and he is, therefore, a very material witness; and
it may be that, without Mr. Parkes's evidence, the case
of the executors cannot be sustained, and so he is a
necessary witness in this particular case. But he is not
so important in contemplation of law; it cannot be said
that a will cannot be established without the evidence
of the drawer of the will, because there may be the
subscribing witnesses, or other persons, who were present
at the time he read the will; so there is no

(a) Vol. 2, p. 753.

necessity, in a general view, for the examination of Mr. Parkes, however important his evidence may be under the particular circumstances of the case before the Court; and instances are given by Mr. Phillipps and Mr. Starkie as to who are considered necessary witnesses; as, for example, where a party is robbed, and brings his action against the hundred; in his action he is permitted to prove the robbery and the extent of his loss, because, under the circumstances of the case, no other witness was able to prove this. But, in respect to other circumstances, he is not admitted to prove them: such as that the place in which he was robbed was within a particular hundred, because other witnesses could prove that as well as himself.

Under these circumstances, I am of opinion that Mr. Parkes is not a competent witness, and accordingly I reject his evidence; and perhaps it is as well that the matter should be so left, considering the situation in which he is placed; it will remove from the Court what it has always felt to be a great inconvenience, that is, when the Court has to derive the principal evidence in the cause from a party who has had the conduct of the cause. I say nothing as to this particular case; but, as a general rule, it is desirable that the drawer of the will, and the attesting witness of the will, should not be the person who has the management and conduct of the cause; who retains and instructs the proctor and examines the witnesses.

I am of opinion that the evidence of Mr. Parkes cannot be received, and that it is my duty to reject it.

1838.

February 27th.

HANDLEY
and
JONES
against
EDWARDS.

1838.

February 27th.

HANDLEY
and
JONES
against
EDWARDS.

The Judge having rejected the evidence of Mr. Parkes, the proctor of the executors protested of an appeal ; but the Court, considering the whole hearing of the cause to be one act, under the authority of *Barry v. Butlin* (a), before the Judicial Committee of the Privy Council, and that the rejection of Mr. Parkes's evidence was not an appealable grievance, intimated its intention of proceeding with the cause, and suggested to the counsel of the executors that they would not prejudice their right of appeal by proceeding with the argument.

On a subsequent day, the *Queen's Advocate* and *Phillimore* prayed that the cause might stand over, contending that the present was an appealable grievance, and submitting that the Court ought not to proceed to give sentence.

SIR HERBERT JENNER.

If this is an appealable grievance you must present your petition on your own responsibility ; I am not to determine whether this is a grievance : I see no distinction between this case and that of *Barry v. Butlin*.

The Court refused to allow the cause to stand over, and *Lushington* and *Addams* continued their argument against the will.

March 7th.

The cause was again called on, and the counsel for the executors not appearing, the parties were called in the usual way ; the proctor of the execu-

(a) 1 Moore's P. C. Cases, 98.

tors then alleged that he had presented a petition of appeal, and that the petition had been answered. The Court, however, directed the cause to be proceeded with, and finally pronounced against the validity of the will.

1838.

March 7th.

HANDLEY
and
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against
EDWARDS.

CONSISTORY COURT OF LONDON.

*COOD otherwise COODE against COOD otherwise
COODE.*

1838.

March 23rd.

Divorce for
adultery.

This was a case of divorce, by reason of adultery, brought by Lieutenant Henry Cood or Coode, R. N., against Jane, his wife.

The libel pleaded, that in 1823, Mr. Cood being master's mate in his Majesty's ship Pyramus, then on the West India station, paid his addresses in the way of marriage to Jane Durkin, widow of James Durkin, a warrant officer (carpenter) of the said ship, and who had, since his death, remained on board the Pyramus; that on the 11th of August, 1823, Mr. Cood having obtained leave of his commander, Captain Newcombe, went on shore at Barbadoes, with Jane Durkin, and they were married at a private lodging-house, in Bridge Town, in the parish of St. Michael, by the Rev. Wm.

A husband, who, upon the discovery of his wife's adultery, commences a suit against her for divorce, but abandons such suit through want of funds to carry it on, is not thereby barred from seeking a divorce at a subsequent period. A collated copy of an entry in the marriage register at Barbadoes admitted as evidence.

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COODR
against
COODR.

Garnett, the rector of the parish, in the presence of Mr. Wm. Duke, a lieutenant of the *Pyramus*, in pursuance of a license for that purpose from the secretary's office of the governor; an entry of the marriage being made in the register book of the parish, of which a copy was exhibited. The libel went on to plead that Mrs. Cood came to England in 1828, after the parties had cohabited abroad as husband and wife; that Mr. Cood remained abroad from October 1828 till October 1830, absent from his wife; and that during that time she formed a criminal connexion with a man unknown, in London, became pregnant, and was delivered of a still born child, at Portsea, in March 1830; that these facts were not known to Mr. Cood, till after his arrival in this country, in October 1830; that in 1830, he commenced proceedings against his wife in the Court of the Dean and Chapter of Westminster; but that having in the said year, sustained a loss of nearly the whole of his property, in consequence of a relative, who was indebted to him in the sum of eleven hundred pounds, having become a bankrupt, and having, in conjunction with a co-trustee of certain funded property, of considerable amount belonging to him, (Mr. Cood,) sold out the same, and applied the proceeds thereof to his or their own use, he (Cood) was obliged to abandon the said proceedings for want of sufficient pecuniary means to bear the expenses of the same, he having, at that time, no other property than the moiety of the proceeds of a small leasehold house, amounting to the sum of fifteen pounds or thereabouts yearly, and his half-pay as a lieutenant in the Royal Navy, amounting to ninety-one pounds yearly, and that

he had never, at any time since the said period, acquired any further or other property, save the sum of three hundred pounds or thereabouts received by him in sundry payments, on account of the said trust stock.

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against
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It was further pleaded, that after the abandonment of the proceedings, Mr. Coode was induced, for the purpose of avoiding claims and suits from the creditors of his wife, to enter into a deed of separation with her, whereby he agreed to allow to her, and hath continued to allow and pay to her, for her separate maintenance, the annual sum of twenty pounds (she being in addition thereto entitled to a government pension of twenty-five pounds per annum, as the widow of James Durkin, deceased.)

The principal point in question before the Court, was the sufficiency of the proof of the marriage. Lieutenant Duke was dead, and the Rev. Mr. Garnett, the rector, could not identify the parties. The copy exhibited of the entry of the marriage, was to the following effect:—

<i>“ Barbadoes</i>	<i>Parish of St. Michael.</i>
1823.	MARRIAGES.
August 11.	<i>Henry Coode to</i> <i>Jane Durkin.”</i>

“ The above is a true extract from the register of the above parish, given under my hand, this 17th August, 1837. To all whom it may concern.
W. GARNETT, Rector.”

This signature was attested by a notarial certifi-
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cate from Mr. Edward Hooper Senhouse, acting secretary, and in that capacity exercising the office of sole notary public of the island of Barbadoes.

Captain Newcombe, who was examined as a witness, had no doubt the certificate related to the marriage in question, and that the parties were married; he believed that the signature "W. Garnett," was the real signature of the rector of the parish of St. Michael, Barbadoes. He deposed that he (the witness) applied, at Mr. Coode's request, to the governor of the island for a special license for the marriage, and had no doubt that it was granted; that the parties on returning to the *Pyramus*, owned and acknowledged themselves to be man and wife, cohabited as such, and were so treated.

The parties did not subscribe the register.

Addams and Curteis, for the husband.

The only point seems to be, whether there is sufficient proof of the marriage of the parties?

The only witness living who was present at the marriage, is Mr. Garnett, the Minister, who can not identify the parties, the marriage, therefore, must be proved as if all the parties present were dead. The copy of the register which is exhibited, although not a collated copy, may be taken in supply of proof, the signature of the minister is proved to be in his handwriting; the register is a public document, registers of marriages being directed to be kept by the law of the colony (a).

(a) And whereas it hath been, and still is, a laudable constitution, and custom of our native country to have in every parish, a true and perfect register kept of all christenings, marriages and burials, and the names of all such fairly entered in the same, and the day and

The question is, whether there is not sufficient proof of the marriage, under the case of *Rex v. Brampton*? (a) In *Morris v. Miller*, (b) which was an action for criminal conversation, the question was, whether, in order to support the action, there must not be proof of an actual marriage? the fact being, that the parties were married at May Fair Chapel, and the register or books could not be admitted in evidence, the minister (Keith) had been transported, and the clerk was dead. But cohabitation, name, and reception were proved, and Lord Mansfield said: "Proof of the actual marriage is always used and understood in opposition to proof by cohabitation, reputation, and other circumstances from which a marriage may be inferred." In such actions there must be proof of a marriage in fact, as contrasted to cohabitation and reputation of marriage arising from thence. Perhaps there need not be strict proof from the register or by a person present; but strong evidence must be had of the fact, as by a person present at the wedding dinner, if the register be burnt, and the minister and clerk are dead. Here Captain Newcombe states that the parties returned on board as married persons, and that they

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year annexed, which hath been, and is found to be of much advantage to posterity; be it therefore enacted, published, and ordained, by the president, council, and assembly, and by the authority of the same, that after the publication hereof as a duty incumbent on every minister in his respective parish within this island, he do keep a true and faithful register of all and singular the christenings, marriages and burials within their respective parishes; the churchwardens of every parish to provide a large book fit for the keeping of the said register, and enter both the christian and the surname of each, together with the day and year expressed, and send a certificate of the same to the Secretary's office, in the month of March, yearly, there to remain on record.—Law of 1661.

(a) 10 East, 282.

(b) 4 Burr. 2057.

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were always treated as man and wife. This is strong evidence of the fact.

THE COURT.

Lord Mansfield puts it on the supposition that the other proof is impossible.

Addams.—The party has given all the evidence that can be reasonably required of him, *nemo tenetur ad impossibile*. If, however, there is any difficulty on this point, we would pray the Court to rescind the conclusion of the cause, in order that further proof may be given of the copy of the entry of the marriage; for since the cause was set down for hearing the party has received a collated copy of the entry from a gentleman who is just arrived from Barbadoes.

The Queen's Advocate, and *Haggard* for the wife.

No case has been pointed out in which a divorce has been pronounced for, unless there had been proof of the fact of marriage. The circumstances stated by Captain Newcombe go to prove the identity of the parties, supposing there had been legal proof of the fact of marriage; but they are insufficient as a foundation for a divorce. The Court requires the best evidence that can be obtained. As to the entry itself it is a question whether it could be received as evidence. Fleet entries cannot be received. Books kept under public authority in this country may be received; but this would be the first instance of books kept in foreign countries (and Barbadoes for this purpose is a

(a) 1 Esp. 353.

foreign country) being received. In *Leader v. Barry*, (a) Lord Kenyon rejected an examined copy of a register of marriage in the Swedish Ambassador's chapel at Paris; but supposing the copy of the register to be evidence, it must be proved in the regular way; a copy certified under the hand of the clergyman is not sufficient; it must be proved to have been collated with the original.

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Assuming, however, the proof of the marriage to be sufficient, what has been the conduct of the husband? He alleges that his wife had an illegitimate child in March 1830, and that he knew it in October or November 1830, and that he commenced a suit against her; but he abandoned that suit in January 1831, and although he assigns his poverty as the ground, it does not appear that he is worth one shilling more now than then. But he entered into an agreement to make his wife an allowance, which it is his object to get rid of.

THE COURT.

My impression is, that the deed would remain the same if a divorce be pronounced.

JUDGMENT.

Dr. LUSHINGTON.

Assuming for the present purpose, that the marriage is proved, and it being admitted that there is satisfactory evidence of the adultery charged against Mrs. Coode, distinguishing this part of the case from the other, I go to the next branch of it, namely, whether Lieutenant Coode, in consequence of the lapse of time between the period when the

(a) 1 Esp. 353.

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adultery first came to his knowledge and the commencement of this suit, can be properly debarred from the remedy he prays.

It has been argued, on the part of Mrs. Coode, that she has been exposed to considerable disadvantage by losing a possible opportunity of recriminating against her husband; that it is possible some evidence may have thereby been lost. I observe that this is the suggestion of counsel only, and is not supported by anything which appears in the evidence, or that there is anything bearing upon it in any of the circumstances of the case. The principle of this Court, and of all Courts, is, that the husband ought to proceed with such celerity as the case admits of, to obtain the remedy he seeks; but I conceive it is also settled, that if any circumstances occur which reasonably prevent him from proceeding, he is not thereby debarred from doing so at a time more convenient to him.

In *Best v. Best*, (a) there was a considerable lapse of time between the adultery and the suit; but the Court was satisfied with the reasons assigned for the delay by Mr. Best, in an affidavit, and allowed the case to proceed. It appears in this case that Mr. Coode is a lieutenant of the navy, and on half-pay, and when he commenced the suit in the Court of the Dean and Chapter of Westminster, he had no other property. Now, the marriage having taken place at Barbadoes, and the adultery being committed in this country, he would have incurred considerable expense, before his object could have been effected, if his wife had resisted the suit. I think it abundantly probable that, if the suit had

(a) 2 Phill. 161.

gone on, and the wife had opposed it, the expense would have been beyond his means. I should have more difficulty if I could be satisfied that the wife can have been in any degree prejudiced by the delay; if, for instance, any benefit secured to the wife would be annulled by a sentence of divorce. But I apprehend there is no just ground for this opinion. In *Thurlow v. Thurlow*, the same thing occurred, but a divorce was pronounced, and the trustees, under the deed of separation, retained the money secured by the deed for the benefit of the wife, under the opinion of the whole of the Court of King's Bench. (a) I am, therefore, satisfied that the husband had a right to proceed, and the only point is, whether the marriage is established by the evidence in the cause? and that question is of very great importance indeed.

In this case, or arising out of the circumstances of the case, many considerations occur as to what the Court would deem sufficient evidence of marriage to entitle a party to proceed in a suit for adultery, and to support a sentence of divorce. I do not know that there is in the books any express authority for the *quantum* and species of evidence. But ought the Court to be stopped from doing justice because it has no legal precedent, or be debarred by technical rules? The Court must not forget that Great Britain has colonies of its own, as well as cessions from other powers; that since the peace, the inhabitants of this country have resorted in great numbers to foreign countries, and that a great many marriages have been celebrated on the continent, as well as in the colonies, and I

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(a) *Jee v. Thurlow*, 2 Barn. & Cr. 547.

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should be sorry to lay down as an absolute rule, from which there should be no deviation; that, in every case, I ought to require the same strictness of proof as in this country.

The first question is, whether, laying aside the certificate of Mr. Garnett, there is evidence sufficient to satisfy me that there has been a marriage between these parties. What is the nature of that evidence? It is the testimony of Captain Newcombe, the commander of the vessel, who states that he was perfectly aware of the parties' intention to marry; that he wrote to the governor to obtain a special license for their marriage, and that, after the marriage was supposed to have taken place, they returned to the ship as man and wife, and were so treated.

I will not determine, unless driven to it, that such evidence as this is alone sufficient proof of a marriage, though I am perfectly aware of the great inconvenience which would arise from laying down a fixed rule; but there is other evidence.

A paper is produced of the following kind: it is a printed paper, headed "Barbadoes, parish of St. Michael," and purports to be an entry of a marriage on the 11th August, 1823, between Henry Coode and Jane Durkin, certified to be a true extract from the register of that parish. "Given under my hand, the 17th August, 1837. To all whom it may concern. W. Garnett, Rector." And on the other side is a notarial certificate as to the handwriting of the Reverend Mr. Garnett.

Let us consider the different circumstances under which certificates of this kind would come from places out of England. They may come from foreign countries, or from places subject to Great

Britain ; they may come from the East Indies or the West Indies ; from colonies where the same law prevails as in England ; or from colonies where there is a different system in its rules and general principles, as Barbadoes, Saint Lucie, Trinidad, or Demarara, in each of which there is a different system of law. It is not necessary to say what I should do with any certificate from Demarara, Trinidad, or Saint Lucie. Before I did so, I must consider what law prevailed there—Dutch law, Spanish law, or French law. But this certificate comes from Barbadoes, one of the oldest British settlements in that part of the world, and where the old English law prevails, and unless altered by some enactment of the British Parliament, or of the House of Assembly there, with the consent of the Crown, the marriage law of that island is the same as it was in England before Lord Hardwicke's Marriage Act. Then the question arises, whether, supposing a certificate to be produced, which had been duly collated with, and proved to have been a copy or extract from a marriage register kept in the colony, and on the authority of an act of Parliament, or of the House of Assembly, how I should treat such a document ?

In the first place, this document is no such thing ; what it purports to be is this—a copy of the register, but it is not pretended to have been collated with the original document, which is in existence : it is signed by the rector, whose signature is verified by Mr. Senhouse, the acting Secretary at the island. It is clear that this cannot be legal evidence ; it amounts to no more than written hearsay.

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But it is stated that there is a collated copy in this country, and which may be produced if the Court would rescind the conclusion of the cause, in order to receive this evidence. I do not know that I am bound, in this stage of the cause, to give my opinion as to the effect of receiving such a collated copy; but as it may save the party expense, I do not hesitate in delivering my opinion.

The only point on which I have to speak is, the effect of such a copy of a register kept by the authority of the law of the colony where the marriage took place, that law being English law.

In *Huet v. Le Mesurier* (a), a copy of a register of baptism in Guernsey was not admitted, because it did not appear by what authority the register was kept. Supposing it to have been proved that Guernsey was part of the diocese of Winchester (as it is), and that by ancient canon a register was required to be kept there, different considerations might have applied to that case, in my opinion; for I am of opinion that there is no ground of distinction, supposing the register had been kept by the order of a competent authority, between registers kept in Guernsey and in this country. The case referred to by the Queen's Advocate, *Leader v. Barry*, does not interfere with any opinion I am about to pronounce. There Lord Kenyon refused to receive an examined copy of a register of marriage in the Swedish Ambassador's Chapel at Paris, for a reason which does not apply to an examined copy of a register kept by British authority: the

(a) 1 Cox, 275.

whole distinction lies between a copy of a foreign register and a copy of a British register.

It should be recollected that the greatest possible inconvenience would arise if the rule were to be pressed too far, of requiring that the clergyman who celebrated the marriage in such a case should be examined, he being the only person living who was present at it. Recollecting that marriages take place in the East Indies, and that considerable delay must arise, and perhaps deaths might happen, before a marriage could be so proved ; recollecting also that we have settlements in Africa, I think it is too much to lay down as a positive rule, which must never be relaxed, that some person present at the marriage must be examined, in order to establish its legality.

The counsel for Lieutenant Coode have referred to one of the laws of the island of Barbadoes, which law must have received the sanction of the Crown, and that enactment is of the first importance. By that law registers of christenings, marriages, and burials are directed to be kept in the different parishes, under a penalty. I apprehend that the House of Assembly had ample authority by the Constitution to pass that act, and that it must have received the sanction of the Crown, whereby it became a part of the law of the island. I see, therefore, no reason, satisfactory to my mind, why, under the circumstances, I should not be justified in receiving such examined copy of the register as evidence of the marriage ; and I am not aware of any case in which it has been laid down, that where a register is kept in any colony under English law, an examined copy of such register is not evidence.

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I think, therefore, on the whole, that I am bound to receive the collated copy, and I think the evidence produced in the cause will satisfy me, on the production of the collated copy, as to the marriage, the identity of the parties, and the adultery, and that I should be bound to pronounce for the divorce.

I therefore rescind the conclusion of the cause, in order to receive this evidence, the party at the same time pleading the law of Barbadoes, directing registers to be kept.

April 24th.

The COURT, on the further evidence, pronounced for the divorce.

PREROGATIVE COURT OF CANTERBURY.

HOBBS *against* KNIGHT.

On the admission of an Allegation.

1838.

June 19th.

HOBBS
against
KNIGHT.

A party duly executed a will in 1835, and after the 1st of January, 1838, cut therefrom his signature.

Held, First,

that the effect of such act was to be considered with reference to the provisions of the stat. 1 Vict. c. 26; the 34th section of that statute enacting, that the act "shall not extend to any will made before the 1st of January, 1838," not applying to any act done to a will after that date. Secondly, that the cutting out the signature amounted to a revocation of the will under the terms "tearing or otherwise destroying the same," in the 20th section of the statute.

Joseph Hobbs, deceased, died on the 7th of March, 1838; leaving a widow and one child; on the day after his death, there were found in a drawer of his writing desk, the following testamentary papers; a will, dated the 19th of January, 1835, with three codicils, written upon the same paper; the first without date, the other two dated the 25th of February, 1837; from this will which had been executed in the presence of two witnesses,

the signature of the deceased was cut out ; in other respects it was uninjured ; there was also found a will dated the 17th of February, 1838, signed by the testator, but not attested by witnesses, which was consequently invalid, by reason of the statute 1 Vict. c. 26.

An allegation, propounding the will of 1835, with the codicils thereto, was brought in on behalf of Mr. C. W. Knight, one of the executors, which was opposed on the part of the widow.

This allegation, after pleading the making and execution of the will in question, set forth circumstances and declarations of the deceased, in order to show, that it was in a perfect state until after the 1st of January, 1838, (when the act, 1 Vict. c. 26, came into operation) ; and it also pleaded the will of the 17th of February, 1838, to be in the deceased's handwriting, and that at the date thereof, and sometime prior thereto, he well knew that two attesting witnesses were requisite, in order to give validity to any will made or executed after the 31st of December 1837, and that at different times in the present year (1838) prior to the said 17th of February, he so declared or expressed himself, to or in the presence of divers credible persons.

Phillimore opposed the admission of the allegation, on two grounds. First, that the stat. 1 Vict. c. 26, did not apply to this case, and that under the old law, the will was clearly revoked. Secondly, that, supposing the act 1 Vict. to apply to the present question, the excision of the name of the testator amounted under that statute to a revocation of the will.

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With respect to the first point. The words of the 34th section of the act are clear, and seem to be capable of but one construction; it is expressly enacted in that clause, "*that this act shall not extend to any will made before the first of January, one thousand eight hundred and thirty-eight.*" It is plain, from these words, that the legislature intended to leave all wills made before the 1st of January in the same situation as if the act had never passed; there is no limitation in the words, and the Court cannot restrain the meaning of a statute, the words of which are so clear and unambiguous; if the act does not apply to this case, there can be no doubt that the will is revoked.

But, secondly, supposing the act to apply, still this instrument is revoked; the twentieth section of the act provides, "that no will or codicil, or any part thereof, shall be revoked, otherwise than as aforesaid (that it is as enacted in the eighteenth section), or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, *or by the burning, tearing, or otherwise destroying the same*, by the testator or by some person, in his presence, and by his directions, with the intention of revoking the same;" now, supposing that cutting should be held not to fall within the term *tearing*, under this clause; but which, if it were so held, would lead to great absurdities, still there can be no doubt but that this will is revoked under the terms *otherwise destroying*; for the will itself is destroyed; there is no signature to it, and it does not appear whose will it is. A

will is no will unless it be signed at the foot or end thereof, which is not the case in this instance.

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Lushington, in support of the allegation. This allegation is admissible, and the will propounded, supposing the facts set forth to be true, is entitled to probate.

Two objections have been taken ; first, that the statute 1 Vict. c. 26, does not apply to this case ; secondly, if that act does apply, that what has been done to the will in question amounts to a revocation. (As to the first point, he contended to the effect of the observations in the judgment of the Court.)

With regard to the second point, under the present act of Parliament, a will, when once made, cannot be revoked, except in the manner pointed out by the statute. The only modes of revocation permitted by the statute are (except by other means which do not apply to this case) by *burning, tearing, or otherwise destroying*. Under the Statute of Frauds there were also the words *obliterating and cancelling*, and these words being omitted in the present act, the Court must presume that they were advisedly omitted, as no doubt they were, in order to avoid the uncertainty and doubt caused by those terms ; a will, therefore, to be revoked, must first be either burnt or torn ; with respect to the first, of which terms the recent decision of the Court of Queen's Bench, in the case of *Reed v. Harris*, (a) shews, that in order to satisfy that term there must be actual burning, the intention of the testator, although perfectly clear, will not do, unless there be

(a) 6 Ad. & Ell. 209 ; S. C. 1 N. & P. 405.

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some burning ; and so I should submit as to tearing, there must be some tearing ; is then cutting to be considered tearing under this statute ? it is quite a distinct act ; tearing is not cutting any more than burning ; to hold otherwise would be allowing another mode of revocation than is pointed out by the statute.

Then does this fall under the terms *otherwise destroying* ? I submit that it clearly cannot ; the legislature must have meant that the thing itself should be destroyed ; for obliterating will not do ; cancelling will not do ; if the whole will be obliterated, that would not revoke the instrument ; can then this will be revoked by cutting out the name of the testator only, which is so carefully done, as not in the least degree to destroy the will ?

The testator knew that two witnesses were necessary to the validity of a will, he intends then to execute a new will, and on the 17th of February last, he, himself, writes a new will, and takes his signature off the old one, intending, when he executed that of February, that the former will should then be revoked, but the latter never having been completed, the first is not revoked. *Onions v. Tyrer. (a)*

SIR HERBERT JENNER.

June 20th.

The purport of the allegation, which now stands for admission before the Court, is to shew that the will executed by the deceased in January 1835, remained entire and complete until after the commencement of this year (1838,) when the act of her present Majesty, entitled " An act for the amend-

ment of the laws with respect to wills," came into operation : and the question is, whether, under the circumstances stated in the allegation, this will is revoked? The admission of the allegation is opposed on two grounds ; first, that the act 1 V. c. 26, does not apply to this case at all ; that the act applicable to the paper, is that which existed before the 1st of January, 1838. Secondly, that if the act does apply, the excision of the signature of the deceased is a sufficient revocation of the will in reference to the provisions of that statute.

On the other hand, it has been argued that the allegation is admissible on these grounds,

First, that the act does apply ;

Secondly, that the excision of the name is a sufficient revocation under the statute, and

Thirdly, that supposing a will may be revoked under the statute by the excision of the name of the testator, still, that in this case, the deceased did not intend to revoke the will until a second will should have been duly executed, which not having been done, that the will before the Court remains unrevoked.

The first question then is, does the act 1 V. c. 26 apply to this case ; because if it does not apply, it is admitted that the present will is revoked. Whether the act does apply, depends upon the construction to be put upon the thirty-fourth section which is to this effect, " And be it further enacted that this act shall not extend to any will made before the first day of January, 1838 ;" the rest of the section relates to other purposes which it is not necessary to mention. It cannot be denied that the words are of a general import, and seem *prima facie* to be intended to leave all wills executed before

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the 1st of January, 1838, in the same situation as if the act had not passed, and that they should be treated and dealt with according to the law as it then stood, not only as to the manner of their execution, but also as to their revocation and their effect and operation; and I confess, on first looking at the act, that I did entertain the notion that this was the true interpretation to be put upon it; but upon further consideration, and looking at the inconveniences and inconsistencies which would arise out of such an interpretation, the Court has been induced to adopt a more restricted interpretation, and to hold that the legislature did not intend that wills executed before the 1st of January 1838, should be exempted from the necessity of complying with the provisions of the statute with respect to any act done to such wills after that time.

Let us see the inconveniences of a more extended application of these words. But for this clause every will made after the passing of the act, namely, the third of July 1837, in order to be valid must have been executed in the manner prescribed by the statute; but by this section, any will executed in the manner allowed by the law, previous to the passing of the act, would be valid, if made before the 1st of January of this year; and it appears to the Court that this clause was inserted for the purpose of the alteration in the law becoming known before it should come into effect; but the Court cannot think that the legislature intended that wills executed before the 1st of January 1838, should be subject to the old law for an indefinite term, and that they might be altered, obliterated or interlined, and still continue to have effect. If this were the true interpretation

of the statute, what would be the effect? Suppose a will executed on the day before the act came into operation, that will would require neither witness nor signature, the consequence would be, that the testator, if he lived sixty years, might from time to time alter the will to any extent; he might remove the names of legatees and substitute others, he might substitute one residuary legatee for another, and one executor for another, and make an entirely new disposition of the property without the necessity of having any witnesses, or of any persons being privy to the alterations, if these changes and alterations were capable of being indentified as his act: this is one of the inconsistencies which would arise from an extended application of the 34th section of the act. Again, the 18th clause of the statute enacts, that a will shall be revoked by the subsequent marriage of the testator; but a will executed before the 1st of January 1838, would not be revoked by marriage alone, and would be revoked by presumption arising from an alteration in the circumstances of the testator, contrary to the provisions of the 19th section. These are consequences so inconsistent with the professed intention of the legislature, to place all wills from a certain date on the same footing, that the Court is of opinion that it never could have been intended by the legislature to leave wills executed, prior to the time when the act came into operation, subject to all the considerations of the law as it stood previously, and therefore, that a more restricted interpretation must be put upon the words; and the Court will hold, until otherwise advised by the decision of a superior tribunal, that wills executed

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before the 1st of January 1838, are subject to the provisions of the statute 1 Vict. c. 26, with respect to any act done to them subsequently to that day.

Assuming then, that the statute applies to the case before the Court, the next question is, does the cutting out of the signature of the testator, the rest of the paper remaining entire, amount to a revocation of the will? In order to determine the effect of this act (the excision of the name of the testator) we must consider what is necessary to create a valid will under the statute. The ninth section of the statute is to this effect, "That no will shall be valid, unless it shall be in writing and executed in manner hereinafter mentioned (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction; and such signature shall be made or acknowledged by the testator, in the presence of two or more witnesses present at the same time, and such witnesses shall attest, and shall subscribe the will in the presence of the testator; but no form of attestation shall be necessary." It appears, then, that the signature of the testator is necessary to the validity of a will; that no will is valid without it, so that it is not only a material part, but an essential part, without which a will cannot exist.

A will being so executed, the next question is how is it to be revoked? The 20th section provides, "that no will or codicil, or any part thereof, shall be revoked, otherwise than as aforesaid" (that is, by marriage, under the 18th section) or by another will, &c.," which does not apply to this case, "or by the burning, tearing, or otherwise destroying

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the same by the testator, or by some person in his presence, and by his direction, with the intention of revoking the same." Assuming then that the act was done by the deceased, it must be taken to have been deliberately done; the effect of this is now to be considered. The signature of the testator being, as I before said, an essential part of a will, it is difficult to comprehend when that which is essential to the existence of a thing, is destroyed, how the thing itself can exist. There can be no doubt that if the name of the testator had been burnt or torn out, the revocation would have been as complete as if the will had been torn into twenty pieces. If this were not the case, it would lead to many absurd consequences. But it has been argued, as the present act of Parliament has pointed out certain modes with regard to the revocation of wills, that the Court cannot go beyond the express terms of the act; that the words being confined to burning, tearing, or otherwise destroying, omitting the terms "obliterating" and "cancelling" used in the statute of frauds; there must be an actual burning or tearing, or as to "otherwise destroying," the whole instrument must be destroyed; that cutting, in the present case, is not tearing—(burning is out of the question)—and the instrument being destroyed, that there is no revocation; upon this part of the argument, the case of *Doe v. Reed v. Harris* (a) in the Queen's Bench was referred to, in which the testator had thrown his will into the fire, with the intention of destroying it, and a part of the cover was burnt, but there being

(a) 6 Ad. & Ell. 209. 1 Nev. & P. 405

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burning on the instrument itself, the judges of that Court held that the will was not revoked ; that the words of the statute of frauds had not been complied with. But that case is not applicable to the present point, for here a part of the will, the most essential part is removed, and if in that case, the name of the testator had been burnt or torn off, I think the Court of Queen's Bench would have held that to be an effectual revocation by burning or tearing, for, according to the judgment in that case, it was not required that the whole will should be burnt or torn. The learned judges do not say how much it is necessary should be burnt, but Mr. Justice Coleridge says it is sufficient if the entirety of the will is destroyed ; his expressions are these, " We were pressed with the argument ; must the whole of the document be destroyed ? I say no : but there must be a destruction of so much as to impair the entirety of the will, so that it may be said that the will does not exist in the manner framed by the testator." So I say here is not the entirety of the will destroyed by the removal of the signature of the testator ? It is true this is not an act of tearing, in the strict sense of that term ; but, if the circumstances of this case required it, I think it would not be difficult to shew that a will might be revoked by cutting with an instrument as well as by tearing, if a corresponding effect be produced by the one act as by the other. The Latin equivalent for the verb " to tear," is *lacerare*, but I find, upon looking into the dictionaries, that *exscindere*, " to cut out," is also used in the sense of " to tear," and Cicero, uses the phrase "*exscindere epistolam*," (which is remarkable,) with regard to the destruc-

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tion of a document. But it is unnecessary to further into the consideration of this point consistently, with the true construction of the act of Parliament, and the decision of the learned judges of the Court of Queen's Bench, it is unnecessary, in order to bring the act within the meaning of the words, "otherwise destroying, the material of the will should be destroyed sufficient as it appears to me, if the essence of the instrument (not the material) be destroyed. Suppose a will to be written in pencil, and the words were removed by means of Indian rubber; would there be any doubt that that would be a sufficient revocation? Cutting is a mode of destroying as effectual as tearing, and it appears to me that tearing a will to this extent be a sufficient destruction of it, the same effect must be attributed to an act of cutting it; what would be the consequence of a different construction? Suppose a will torn into two or more pieces, the will, no doubt would be revoked; but if it were cut into two or more pieces with a knife that would be no revocation and if the pieces could be collected and put together, the will must be pronounced for valid by the Court. I cannot conceive it possible that it was the intention of the legislature to leave the law in that state. The question then comes to whether this be or be not a destruction of the will. I consider the name of the testator to be essential to the existence of a will, and that if that name be removed, the essential part of the will is removed and the will is destroyed; otherwise the statute does certainly not deserve the title it bears, namely, "An act to amend the laws with respect to wills."

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It was said in the argument (perhaps it is not very material) that a will cannot now be revoked by obliteration, the term obliteration having been advisedly omitted by the legislature; but I am not prepared to say (although I now merely throw this out) that a will may not be revoked in that way, for I see no reason why, if the obliteration amount to a destruction of the will (that is, if the name of the testator, which is essential to a will, be so obliterated that it cannot be made out), a will may not be revoked in that way as well as any other. Suppose a testator had so obliterated his name from a will as to render it impossible to make it out, and I am not at liberty to supply it by evidence *aliunde*, how would this operate with respect to the 21st clause of the act, which enacts, "that no obliteration, interlineation, or other alteration, made in any will after the execution thereof shall be valid, or have any effect, except so far as the words, or effect of the will before such alteration, shall not be apparent." By this clause, as I understand it, where words are so obliterated that they do not appear, it is a good revocation *pro tanto*. Would not the same rule be applied with respect to the name of the testator? I think that it was the intention of the legislature that it should be sufficient if the name of the testator was so obliterated that it could not be made out: it never could be intended that a testator might revoke his will *pro tanto*, and yet not be at liberty to revoke the whole will.

Lushington.—What does the Court say as to the names of the two witnesses? By a parity of rea-

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soning there would be a revocation by the omission of the names of the attesting witnesses.

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I think so too ; and if any such case should I should think that if the names of the attesting witnesses were erased by the testator *animo revocandi*, it would be a sufficient revocation. It might be difficult to make it appear that the names of the witnesses were erased *animo revocandi* ; but it could appear, I should be of opinion, that it amounted to a destruction of the will, within the meaning of the act of Parliament. I do not think that the words “ *otherwise destroying* ” mean that the material of the will must be destroyed, but that it must be something which would amount to a destruction of the will itself.

I am then of opinion that the 34th section of the act of Parliament did not exempt the deed in this case from the necessity of complying with the requisites of the act, as to the manner in which this will was to be revoked ; and secondly, that the act done to the will (the excision of the names) amounts to a destruction of the will within the meaning of the statute.

With respect to the further point, whether the excision of the name was intended only as a revocation, upon a new will being duly executed, I am of opinion that the case of *Onions v. Tyre* referred to in the argument, does not apply to the circumstances of this case, because in that case the deceased believed that the last will was a valid

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and on that supposition he proceeded to annul the former will ; while in the present case, it is pleaded in the allegation that the deceased knew that two witnesses were necessary to the due execution of a will, and therefore that the paper before the Court could not have any effect.

The Court rejects the allegation.

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CHARLES DAY, the deceased in this cause died on the 26th of October 1836, leaving behind him Rebecca Day, his widow, and Caroline Clagett (wife of Horatio Clagett, Esq.,) his natural, lawful and only child. He died possessed of real property of the value of about 140,000*l.*, and personal property to the amount of about 200,000*l.*

The testamentary papers before the Court were a will and codicil, both of the date of the 11th of May, 1834, and four further codicils dated respectively the 2nd, 3rd, 10th and 22nd of September, 1836.

The will and first codicil were propounded on behalf of the executors and probate prayed of those papers only.

The codicils of the 2nd, 3rd and 10th of September were propounded on behalf of parties interested under them ; they were not opposed by the executors.

The codicil of the 22nd of September was propounded by Mr. Dufaur; this was opposed by the executors, and was the only paper against which any strenuous opposition was made. It was as follows :—

“ This is a codicil to the last will and testament of me, Charles Day, of Edgware, in the county of Middlesex, Esquire, which I desire may be considered as annexed to and be taken as part thereof. I hereby nominate, constitute and appoint Mr. Frederick Dufaur, of 23, Queen Ann Street, Cavendish Square, one of my executors, jointly with the executors appointed by my said will, and I give and bequeath unto the said Frederick Dufaur the sum of five hundred pounds, free and clear of legacy duty, for the trouble he may have attending the execution of the trusts thereof; and it is my will and desire that the said Frederick Dufaur should continue after my decease to receive the rents of my houses in London, and also the annuities and mortgage interest which he now receives for me, upon the same terms he now receives the same, dated this twenty-second day of September, one thousand eight hundred and thirty-six.

CHARLES DAY.

The
Seal.

Signed in the presence of, &c.

THOMAS ANSALDO HEWSON, Surgeon,
6, Woburn Place, Russell Square.

HORATIO CLAGETT, Edgware.

FRANCES BARTON, Edgware.

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The case was argued by *Lushington* and *Jenner*,
for the will and first codicil.

Burnaby and *Haggard* on behalf of the widow.

Phillimore and *Robinson* for the codicils of the
2nd and 3rd of September.

The Queen's Advocate and *Addams* for those of
the 10th and 22nd of September.

JUDGMENT.

SIR HERBERT JENNER.

A will and five
codicils being
propounded ;
the will and
four codicils
established :
The fifth being
prepared by a
solicitor in his
own favour, the
deceased being
at the time
of fluctuating
capacity, was
pronounced
against. The
Court not being
satisfied that
the deceased
understood the
contents of the
instrument and
intended it to
operate,
although no
fraud was im-
puted to the
solicitor.

The deceased in this cause, Mr. Charles Day, died on the 26th October 1836. He left a widow, and one daughter married to Mr. Horatio Clagett : and the property which the deceased left behind has been estimated at between three and four hundred thousand pounds. I may take the real property at 140,000*l.* and the personal property at about 200,000*l.* The deceased in the month of May 1834 executed a will and codicil, and on the 2nd September 1836, he executed a second codicil ; on the third of that month, a third codicil ; on the 10th of the same month, a fourth codicil, and on the 22nd a fifth. All these papers are before the Court for its opinion as to whether any and which of them are entitled to probate.

By the will, three gentlemen, Messrs. Underwood, Croft, and Pinder Simpson, are appointed executors and trustees, and they have thought it right to prove the will in solemn form of law. Accordingly the wife and daughter (the only persons entitled in distribution to the per-

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sonal estate of the deceased, in case he had intestate,) have been called on to see the will first codicil propounded. The other codicils, for number, have not been propounded by the executors but some of the parties interested under them appeared before the Court for that purpose. That of the 2nd and 3rd September have been propounded, one on behalf of the sister and sister-in-law of the deceased; the other by one of the cousins; that of the 10th of September by the guardians assigned to three illegitimate children of the deceased, who are provided for by the codicil of the 22nd of September 1881 propounded by Mr. Dufaur, whom it purports to appoint an executor, and to whom it bequeaths a legacy of 500*l.* free of legacy duty, directing that he be continued in the collection of certain rents as during the lifetime of the testator. No appearance has been given for the widow, but for the daughter and her husband, as against whom the proceedings have gone on *in pœnam*.

Some observations have been made on the conduct of the executors in not propounding the codicils of the 2nd and 3rd of September, the former having been drawn up by Mr. Pinder Simpson, executor, and the latter by Mr. John Simpson, son, a person in the confidence of the testator. But I think that there has not been anything improper in the conduct of the executors in this respect; the circumstances under which they were made are so connected with those which were subsequently made, and respecting which greater doubt existed than with regard to the codicils of the 2nd and 3rd of September, that, looking to the tr

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that were to be executed, and the property that was to be distributed under the will, it was proper, for the protection of others as well as themselves, that they should propound only the will and codicil of 1834, with respect to which there could be no doubt that they were the act of the testator; and that they should propound them in solemn form of law; for it was right that they should have a more solemn authority for the administration of this large property than a mere probate in common form; and as some of the codicils were made under circumstances which left considerable doubt as to their validity, it was natural that the executors should desire to propound only the will and first codicil, leaving the parties interested under the other codicils, made at a later period of the testator's life, and after he had been attacked with a disorder of the brain, to protect their own interests, and exonerate themselves from all imputation of wishing to support codicils which were not entitled to the probate of this Court.

When the case began, only one of the executors was before the Court, Mr. Croft; and it has been suggested that some inconvenience may have arisen to the parties propounding the codicils from the absence of the other two executors, who did not appear till after publication had passed, so that the other parties were not entitled to call for their answers, which they might have done if the executors had appeared in the cause before publication. But no real injury, as it appears to me, has arisen to the parties for want of this evidence,—and I think I may dismiss the circumstance from consideration, though I thought it right to notice it, in the course

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of the observations which the Court has felt duty to make with reference to the several arguments propounded in the cause.

It appears that the deceased, was engaged in business as a manufacturer of blacking in this country, and that by his attention to that business, and the manner in which he employed his funds, he amassed a very large fortune, to the amount I have stated. It appears that he had a wife and a daughter, who was married, and for them he has provided by the will, leaving to the wife an annuity of 2,000*l.* and the house at Edgeware, with the furniture in the house, (furniture, plate, wines, &c.) and to the daughter he has bequeathed an annuity of 3,000*l.* and the house called Harley House in Regent's Park, and the furniture, plate, &c. therein; this he has left to her sole and separate use, independent of her husband. By the will he has given various annuities to his own sisters, to the sisters of his wife, and to some other persons, and a legacy of 1,000*l.* to each of certain nephews and nieces, the sons and daughters of his sisters, and the children of the sister of Mrs. Day, and legacies to other individuals, and to servants. He disposes of the residue under certain trusts. It is not necessary to go into them. With respect to the residue of the property it is sufficient to say that under certain circumstances, the relations of the deceased under the will would be entitled to the residue, and that under certain circumstances and contingencies, others might be entitled to an interest arising from the residue. But it is perfectly immaterial what may be the ultimate fate of the residue and the trusts under which it is to be disposed

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By the codicil of even date with the will the sum of 100,000*l.* is bequeathed for the purpose of being invested by the trustees in the three per cent. consolidated annuities, for founding and endowing an asylum for blind persons, the deceased having suffered under loss of sight for twenty years.—Of this will and codicil the deceased named Mr. William Underwood, Mr. William Croft, and Mr. Pinder Simpson, executors, who are appointed to manage the whole of the property, real and personal, under the trusts mentioned in the will. Mr. Pinder Simpson appears to have been for many years on the most intimate terms with the deceased, who had the most perfect reliance on and confidence in him. With Mr. Underwood he was also on terms of intimacy; and these two gentlemen had been named executors in several former wills, which the deceased had executed. Mr. Croft was introduced as executor for the first time, in the will of 1834; the testator having previously consulted and advised with Mr. Pinder Simpson as to the appointment of a third executor. To each of the executors the deceased has bequeathed a legacy of 500*l.* free of legacy duty. The will and codicil seem to have been very carefully prepared; the draft was settled by Mr. Sidebottom and with him the deceased had several interviews before it was completed, therefore these acts were done carefully and deliberately.

In support of the will, the three subscribing witnesses have been examined, as also Mr. Sidebottom; it is useless for the Court to go through the depositions; it is sufficient to state that, by this evidence it is proved beyond all doubt, that the deceased gave instructions for the will, and that Mr.

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Sidebottom had communications with him three times prior to settling the draft, and the gentlemen who are attesting witnesses to the will, Mr. Shaw, Mr. Jopling, and Mr. William Simpson,—have fully proved the execution of the instruments. With respect to these, therefore, there can be no difficulty—the Court must pronounce them valid, and the executors are entitled to probate them.

From this time (May 1834,) it does not appear that any testamentary act was done by the deceased or was contemplated by him, till September 1836, that is, from the 1st May 1834 till the 2nd September 1836, the deceased seems to have remained completely satisfied with the testamentary act he had done, and he continued in confidential intercourse with Mr. Pinder Simpson and his son.

The character of the deceased is not immaterial in the consideration of the circumstances connected with the other testamentary acts. He is described as a man possessing a very strong and acute mind. His mind was remarkably clear in his intellect, and his memory in figures is described by Mr. John Simpson as “quite wonderful.” His memory was so extraordinary, that (as is stated by Mr. John Simpson and others, who have been examined in the cause,) he could remember the items of a very complicated account when read to him but once, he could collect all the items and the order in which they stood in the account,—undoubtedly a remarkable instance of tenacity of memory. The deceased, I have said, was blind, and had been so for twenty years, and for the last two years of his life he had lost the use of his legs, so that he was not able

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superintend the business personally, as he had been previously accustomed to do; but the accounts connected with the business were rendered to him monthly, and he was in the habit of going into the minutest details of them. He paid all the household expenses, and went so far (so I understand it) as to check the washing accounts, sometimes with the assistance of his daughter, and sometimes with the assistance of Mr. John Simpson. He is described as a person of a somewhat overbearing disposition, he would not endure contradiction, and expected implicit obedience to whatever he ordered. He is described by Mr. John Simpson as a man who knew his own abilities, and who expected that what he desired to be done should be done without question or hesitation. The health of the deceased had been (except the loss of his sight, and latterly the use of his legs) remarkably good; there was no serious effect upon it till the early part of the year 1836, when Dr. Clutterbuck first began to attend the deceased in consequence of a disease of the brain, and also on account of symptoms which tended to paralysis—but there was no serious effect on his health till August 1836. On the 26th day of that month, he was attacked by epilepsy, and he had three fits on that day, and five or six on different days afterwards, between 26th August and his death,—all, as far as I collect from the evidence,—before that on the 9th or 10th September, if that was a fit at all, of which the witnesses have some doubt. The effects of the attack on the mind of the deceased were not at first very remarkable. He appears to have recovered to a certain extent his memory and recollection; shewing that, after the

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fits had subsided, though they left some effect on his mind, the effect was not permanent. Mr. Hewson attended the deceased on the 26th August afterwards, and Mr. Hewson attended him from the 28th August; Dr. Clutterbuck was called on the 31st August, when he saw him on nine days between that day and his death. The opinion given by Dr. Clutterbeck is that to which the Court is inclined to pay most attention, considering that he is a person of skill, knowledge and authority, and that he seems (from the tenor of his evidence) to be perfectly indifferent between the parties to the cause.

The opinion of this gentleman is given on the subject of the allegation; he says that he attended the deceased professionally in his last illness. He has been acquainted with him for five or six years, and had attended him in the early part of the year 1835, "at which time he exhibited various symptoms of a paralytic nature, his speech being affected to a certain extent, and his lower extremities completely paralysed." "The illness for which I attended him," he says, "more immediately preceding death, was a continuation of the same disorder, a disease of the brain and spinal marrow,"—so that the commencement of the illness was an affection of the brain and spinal marrow,—"which led to paralysis. At this latter period I attended Mr. Hewson first on the 31st August 1836, and from that day he continued to attend him occasionally to the time of his death, towards the end of October following; I saw him during that period ten different times, at an interval of five, six, or seven days between each visit." He says, "the deceased was attended

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at this period by Mr. Foote, an apothecary of Edgeware, and by Mr. Hewson, an apothecary of Woburn Place, both of whom I met on each of my said visits. Mr. Hewson had attended Mr. Day in his illness in the earlier part of the year. My visits" Dr. Clutterbuck says, "to Mr. Day during the said latter period were but of short duration, seldom exceeding a quarter of an hour. At these times there was a good deal of feverish excitement about him; his mental powers appeared to be weakened, so that, although at my first entrance he conversed quite freely and rationally, he became confused in his thoughts after a little time, so as to induce us to terminate the conversation. After a time his memory seemed to fail him; he became incoherent, unable to sustain conversation, or collect his thoughts; that was the general remark I made upon him throughout. The confusion to which I have deposed seemed to be gradually increasing upon him each time I saw him; his mental powers seemed to be getting more impaired, and he was less capable of sustaining conversation from time to time to the last, more particularly, I should say, during the last two or three times I saw him." And he refers to his notes for the observations he made on the visit of the 5th October, the last visit but two; "Mr. Day this day displayed much unsteadiness and imbecility of mind, wandering as he did on the last two or three visits I paid him;" so that not only on the 5th October, when this note was made respecting him, but on two or three preceding occasions, he shewed "much unsteadiness and imbecility of mind" and "wandering." And in another part of his deposition, on the interrogatories, he says, that

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the visit he paid to Mr. Day, immediately that of the 5th October was on the 21st Sept which is not an unimportant day. He adds subsequent part of his deposition in chief “although Mr. Day did, on the occasion allude to a wandering and imbecility of mind, yet he was not one of them at which for a certain time he did not show tolerable consistency of mind as to know us, and to be able to answer questions. On the last occasion I saw him, Mr. Day’s mind seemed nearly gone.” On the preceding occasion he says, “for ten or fifteen minutes at first, which period gradually decreased in length from visit to visit, he showed a clearness and intelligence of mind, and he then became confused and incoherent.” And at the conclusion of his deposition he says, “before he got confused in the course of my visits, his mind, so long as that period lasted, seemed clear enough for anything.

This is the result of the evidence of Dr. Clutterbuck. But Dr. Clutterbuck only saw Mr. Day occasionally, and not at the early periods of his disorder, on the 26th August, when there have been longer periods of clearness than Dr. Clutterbuck observed in his attendance, and as periods might be sufficiently long to admit of executing such a paper as any one of the cases propounded in the cause,—whether they were sufficient must be determined by the evidence of the witnesses who attested the execution—whether the disorder developed itself, or whether the recollection of the deceased had returned, and he understood and intended to do what by the codicil he put in he intended to have done, at the time the instrument was

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and executed by him. Neither Mr. Foote nor Mr. Hewson thinks there was any serious affection of the deceased's mental faculties till after the 10th of September, and it appears from the evidence of Mr. John Simpson, that he did not see him after the attack till the 3rd of September, and not again till the 11th. This, then, is the account of the deceased's state up to the 10th September, and after that date given by Dr. Clutterbuck : he is unable to detail the observations he made at every one of his visits, but he has made the general observations during the time to the effect I have stated.

The first act the testator did, which the Court has to consider, is with regard to the codicil of the 2nd September ; that codicil was prepared by Mr. Pinder Simpson, the confidential solicitor and the executor of the deceased. It appears that, on the morning of that day, he was sent for from London, and also Mr. Lawrence the eminent surgeon, and Mr. Beaman, the partner of Mr. Hewson, a medical attendant of the deceased. Mr. Foote had been sent for from Edgeware to remain in attendance upon the deceased. With respect to this codicil, all these gentlemen concur in opinion that the deceased was at this time perfectly capable of understanding any business to the extent to which this codicil purports to go : the codicil was explained to the deceased by Mr. Pinder Simpson ; he approved of it and executed it by his mark, sealing it and declaring it to be his act. And the Court has no doubt on the evidence in pronouncing for the codicil of the 2nd of September.

The next is that of the 3rd of September. This is a codicil to give to the sons and daughters of the

deceased's mother's brothers and sisters (with one exception ;) annuities of 20*l.* free of legacy duty in addition to those given by the will. The witnesses to this codicil are Mr. Hewson, Mr. Dufaur, and Mr. Shaw. It appears that on the 2nd September (the day the former codicil was executed) a letter was written by Mr. Pinder Simpson, by direction of the deceased to Mr. Dufaur, stating that it was the wish of the deceased, that he (Dufaur), together with Mr. John Simpson, and another gentleman. Mr. Shaw, would go to Harley House, in the Regent's Park, and open the strong room, where the deceased's papers were deposited, and bring certain papers from thence, and attend at the house at Edgware on the morning of the 3rd September. Accordingly, having got the papers from the house in the Regent's Park, they proceeded to Edgware. On the attendance of these gentlemen at Edgware, Mr. John Simpson had an interview with the deceased, and it is not immaterial to see the deposition of this gentleman as to what occurred on that occasion. He had been very much in the deceased's confidence before this; he deposes that he came up from Brighton on the night of the 2nd September, in consequence of receiving a letter from his father, apprising him that Mr. Day, the deceased, wished to see him "particularly with a view to his making some alterations in his will." That is the information given to Mr. John Simpson by the letter from his father, sent to him at Brighton :—"I do not know" he says "whether my father's letter is now in existence. On my arrival in London, on the morning of the 3rd September, having first seen my father, I proceeded in a post-chaise to the house

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of Mr. Day, at Edgeware, taking with me the draft of his will, which, by my father's direction, I procured in my way from Harley House, Mr. Day's house in London, and, accompanied by Mr. John Shaw, a solicitor, a friend of Mr. Day, and by Mr. Dufaur, the party in this suit; Mr. Day having, as my father informed me, suggested that I should bring those two gentlemen as witnesses." So that the purpose for which Mr. Simpson was to attend, was to make an alteration in the deceased's will, and Mr. Dufaur and Mr. Shaw were to be the two witnesses to attest the alterations, whatever they might happen to be. "On our arrival at Mr. Day's house at Edgeware that day, it being about noon, I sent word to Mr. Day that we were there, and Mr. Day's servant presently came to us with a message that Mr. Day must see me alone. I went up into his bedroom, where he was in bed, and on my entering he said to me, 'Oh John, I want to make a little alteration,—I want to double the legacies of the children of my mother's brothers and sisters.' Those were, I believe, his very words. I said I supposed he meant 'their annuities, they have 20*l.* a year under your will each, and I suppose you want that doubled.' He said 'Yes.' He then added, 'I want to give some additional annuities to my sisters and sisters-in-law.' " That was the effect and purport of the codicil he had executed on the preceding day, and, supposing this account to be correct, it is evident that the deceased had at this time entirely forgotten the transaction of the preceding day, namely, the execution of the codicil; and looking to the tenacity of his memory, it strongly tends to shew that the disorder had had considerable effect

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on his mind at that time. He says, "I this named them, but of that I am not positive—I he must have named them ; for I remember w reply to him was, ' Why Sir, you made the ditions yesterday,' (referring to the last nam dition) ' in a codicil drawn by my father.' " goes on to say :—" I had with me at the tin draft of a codicil which had been handed to my father, as one which he (my father) had pared for him, and he executed, the day before by which it appeared that he (Mr. Day) had this further provision for his sisters and siste law. On my making the observation just s Mr. Day said, alluding to the codicil"—th " in allusion to the codicil of the 2nd Septemb ' Oh no, I never signed it, how could I ;' You at Brighton, and we had no witnesses." yes you did,' I said, ' I have got the draft i hand, and I'll read it to you.' I am not quite that it was at this time I mentioned my havin draft, or whether I mentioned the fact just t he declared he had not signed it ; but I reme that I now read the draft codicil over to him when I had done so, he said, ' Yes, it's right then made some remark to him in allusion to draft codicil ;—' Now, Sir, this is the draft o codicil my father prepared for you yesterday it has your mark to it,' he still said, ' No' but my saying to him ' Yes, it has, and the me men are witnesses,' or to that effect, the recolle of the circumstances seemed to flash upon his and he said, ' Oh yes, I had forgot,— so they w So that, at last, he is brought to a recollectio what took place on that day, and he then reco

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all the circumstances about it. But evidently the disorder had had great effect upon the memory and recollection of this gentleman at this time. The witness goes on—"the draft of the codicil had been made perfect, and the mark of Mr. Day, and the names of the witnesses supplied to it, whether signed by themselves, or copied in my father's writing, I am not sure." The witness has produced the draft of the codicil which is annexed to his deposition. The witnesses to this codicil are, as he says, Mr. Lawrence, Mr. Foote, and Mr. Beaman. The deceased then proceeded to give instructions for a codicil—of alterations he desired to make; and he says to Mr. Simpson, "Well then, interline the annuities of my mother's brother's and sister's children, except Sam Virgo." It appears that Virgo was a person whom the deceased had excluded from the former will, and this tends to show a return of recollection, and a knowledge of the reason why Virgo was excluded from the former will, and proves the motives by which he was actuated in some degree. Mr. Simpson says, "Mr. Samuel Virgo was an excepted person in Mr. Day's will also. I told Mr. Day, that I could not interline the annuities, but that I must make a fresh codicil. I don't remember that he made any reply to this, and I went on and said something to him to this effect:—'Now, Sir, I have brought the draft of your will; had I not better read it to you; my father told me he thought there was some alteration you wished to make, and if there is you can do it all in one codicil'—'it is better than making so many codicils.' He then said, 'Well, John, then give me the heads of it in your flippant way.'

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That was an old expression of his, and I knew what he meant, and did so. I went through the will briefly stating the heads of it to him. He made no remark till I had gone through the will, and then he said, 'It's all right—now I'll sign it.' So it was evident that, though the deceased's mind had been wandering, when his attention was restored and his recollection returned, he knew the purpose for which he had expressed a desire to Mr. Dufaur through Mr. Simpson to come with the will, and order to give instructions as to the alterations intended to make in it, and he was aware of the alteration being different from the other codicil, that is, to increase the annuities to his mother's brother's sister's children. "I told him," Mr. Simpson says, "that before he could do that, I must go down stairs and draw the codicil. He said, 'Why can't you do it here?' and I gave as my reason, that I should there make mistakes." He then says, that he went down into the drawing-room, and drew out the draft of the codicil conformably to the deceased's instructions, and he says, he mentioned to Mr. Dufaur and Mr. Shaw down stairs what had occurred with the deceased, and consulted with them as to the propriety of making the codicil under the circumstances, and it was agreed between them, that there could be no harm in making it, as it was merely in furtherance of the deceased's will. He says, "I read the draft of the codicil just written over to them, and then proceeded with it up stairs to Mr. Day's room. I then sat down at Mr. Day's bedside, and read the draft codicil over to him, and said to him, 'Now, sir, is that what you wish?' He replied, 'exactly.' I then told him that

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would go down and copy it, and then bring up the witnesses. Before I made this observation, Mr. Day, after expressing as I have stated, his approval of the codicil, said, 'Now I'll sign it.' But I represented to him that I must first copy it out; that it must then be read over to him in the presence of the witnesses, and that then he could sign it. He seemed angry at this, and said 'Why should they know what I do?'" Evidently forgetting what had occurred on former occasions, that, on account of his loss of sight, it was necessary that the codicil should be read over to him in the presence of the witnesses. "I represented to him that he seemed to forget that, owing to his infirmity (being blind) it was absolutely necessary that the codicil should be read over to him in the presence of the witnesses. I do not remember that he made any further remark upon this, and I went down stairs, taking the draft codicil with me for the purpose of copying it out. Whilst I was copying it, Mr. Hewson, one of Mr. Day's medical men, arrived from London, and to him I represented the state in which Mr. Day was, and the want of recollection he had just manifested to me, and requested him to go up and see Mr. Day, and report to me if I could with propriety let the codicil be executed. On his return down stairs, he said he thought I might do so; and he having told me, in answer to my question, that he would not object to be one of the witnesses to the codicil, I went up stairs, having finished copying it, taking the copy with me and accompanied by Mr. Hewson, Mr. Shaw, and Mr. Dufaur, the proposed witnesses. I told Mr. Day, on our going into his room, that I had brought the witnesses with me,

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and that I would read the codicil to him, and he could sign it. I then, in the presence of three witnesses, read the codicil over distinctly to Mr. Day, Mr. Shaw, as I best recollect, he held the draft in his hand, looking at it as I read. When I had finished the reading, I asked Mr. Day if it was right, and he expressed his approval of it. I am quite confident that he well knew and understood the contents of the codicil, and that he expressed his approval of it in some way, but whether he said anything, or only nodded his head, in way of approval, I do not recollect." So according to the evidence of Mr. Simpson, deceased was to a certain extent confused, betrayed a want of recollection. In the first place he could not recollect that he had executed a codicil on the preceding day; afterwards, the matter was brought to his recollection; then when the codicil was prepared from the instructions the deceased had received, he supposes that there was no need to do more than sign the codicil, forgetting that it was necessary that the codicil should be read over in the presence of witnesses before it was executed, on account of his loss of sight. But Mr. Simpson is of opinion, that when the codicil was read over he knew and understood the contents of it, notwithstanding the confusion and inconsistency of the deceased, and notwithstanding his forgetting in the first instance that a codicil had been executed by him on the previous day. And Mr. Simpson, at the conclusion of his deposition, says, that he thinks the deceased was "so far of sound memory, and understanding, that he understood what he was doing at the time he gave instructions."



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for and executed the codicil in question ;” but he says he cannot depose that he was of sound mind, memory, and understanding at such time, as he evinced great failure of memory during the time the codicil was in preparation. But the other witnesses present on the occasion (Mr. Hewson and Mr. Shaw) both say, that they believe the deceased to have been at the time perfectly capable of knowing and understanding the contents of the codicil, and of sufficiently sound mind, memory, and understanding, to execute the same, or to do any act requiring thought, judgment, and reflection.

Now it is said that the account given by Mr. Simpson is not one on which the Court can altogether rely ; that in the subsequent part of his deposition, as to subsequent transactions, Mr. Simpson has given an inflamed and exaggerated account of the state of the deceased ; that he is the party by whom the opposition to the last codicil is got up, and that he is the promoter of the opposition to that codicil ; and with respect to certain transactions to which he has deposed, it is said that there is not such a very perfect impression on the mind of this gentleman as might be expected from one in the profession of the law ; (though he is not in partnership with his father in the conveyancing line, but in certain agencies of several noblemen’s estates), but I do not see any reason at present to doubt the account given by him, and that the circumstances did occur as Mr. Simpson represents ; although, it is true, that neither Mr. Hewson nor Mr. Shaw confirms the account given by Mr. Simpson as to many of the circumstances stated by him to have passed previous to the execution of the

codicil. The fact, that neither Mr. Hewson nor Mr. Shaw has mentioned the circumstances stated by Mr. Simpson is no proof that they did not occur. They may not have had their attention called to them in the allegation on which they were examined, and they were circumstances which might not make any great impression on their mind at the time of the execution of the codicil. And therefore there is no reason why the Court should presume (considering the distance of time of the transaction) that Mr. Simpson could have invented these circumstances.

With respect to this codicil, it is not an unnatural or improbable alteration ; and whatever was the state of mind of the testator, the codicil originated with himself, for he is the person (as far as the Court can see) who directed Mr. Shaw and Mr. Dufaur to attend to attest the alteration. It emanated from his own mind, and is not inconsistent with the other acts. Looking at all the circumstances together, although the Court does believe that there was a considerable degree of confusion and incoherence in the deceased's mind and understanding, and in the observations he made ; the Court is still of opinion that there is sufficient proof that the codicil was the act of the testator, and that he executed it with a knowledge of the contents of the instrument, though probably he might have forgotten the transaction some short time after it had occurred. But all parties seem agreed that it is better that the executors should take probate of this codicil ; and the parties present, one and all, conceived no doubt of the fact of the deceased's competency at the time, though at a later period

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the condition of the deceased might be such as to render his acts invalid. With respect to this codicil, therefore, I am clearly of opinion that it is entitled to probate, and I pronounce for it accordingly, and I now proceed to the other transaction which shortly after occurred, that is, the codicil of the 10th September.

I am not aware that between this time (between the 3rd and the 10th September, one week) any thing very important happened. Dr. Clutterbuck visited the deceased on the 5th and the 7th of the month, but he has no recollection of anything particular occurring at either of those visits. The account given of the deceased, as far as I can find, does not state that between the days now referred to he had had an epileptic fit. He had three on the 26th August, and five or six on different days after ; but I do not find that any witness states that between the 3rd and the 10th September there was a single day on which the epileptic fits returned.

Early on the morning of the 10th of September the deceased had a severe attack of some kind or other, followed by a return of the epileptic fits. This attack was of an alarming character, so much so as to induce the deceased and Mr. Foote to apprehend that his dissolution was at hand. On this occasion Mr. Foote was sent for and Mr. Pinder Simpson from London, but Mr. Foote being on the spot was in attendance before Mr. Pinder Simpson arrived ; and the account given by Mr. Foote, in his deposition on the allegation propounding the codicil, is this—" Mr. Day, when I saw him, was in a state of great nervous agitation, and he was evidently under the apprehension that he was

about to die ; in fact he was very ill, and I thought that he might die, and in consequence I had his sisters, Mrs. Lockwood and Mrs. Mary Day, called up, and it was after they came into his chamber that he disclosed to me that he had three natural children ; his man-servant, Thomas Hunt, was in the room at the time also. Mr. Day made this disclosure to me as a declaration, as a dying declaration, of his intentions, and calling upon myself," (that is Mr. Foote) "and his sisters and his servants, to bear witness to what he said, which, as near as possible, was as follows :—'I have three natural children, to whom I have given post obit bonds for 5,000*l.* each, which will be presented at my death, and I wish them to be doubled, and hope Mrs. Day will not object.' " Nothing can be more sensible and rational than these expressions from the deceased. He goes on to say, and it is not an immaterial circumstance, that the deceased then "at the same time stated their ages, saying that one was 16, one 13, and the other 11 ;" and I may observe that though these ages do not exactly agree with the account given by Mrs. Peake, the difference is such as may be easily accounted for, without supposing that the deceased laboured under any confusion at this time. Mr. Foote proposed to the deceased to write down his wishes on paper to give to these children of the deceased some additional benefit, before Mr. Simpson's arrival. The deceased acceded to it, and the codicil of the 10th September was drawn up by Mr. Foote, and executed by the deceased in the presence of Mrs. Mary Day, and Hunt, the servant, who signed their names.

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to it as witnesses ; it was likewise attested by Mr. Foote himself.

It appears that other circumstances occurred between the deceased and Mr. Foote with respect to the preparation of this codicil. He says, "When I proposed to write down what Mr. Day had said, he desired me to do so, and having procured writing materials, I wrote it down in the best way I was able, to express what he had said. During the writing of it, I asked Mr. Day if the children were to have their money as they came of age, and he said that was to be left to the discretion of his trustees." Here a question is put, and he gives a rational and proper answer : "and that will be found in what I wrote for him. It was very short. I made no draft or copy of it, but, when I had finished it, I read it audibly and distinctly to Mr. Day in the presence of his two sisters and his manservant, and he appeared perfectly to understand it, and then signed it by making his mark to it in the presence of his said sisters and myself and the manservant Hunt." He says, "I put a wafer seal to it, and Mr. Day went through the ceremony of placing his finger to it, and declaring it to be his act and deed. I was particular in having everything done which occurred to me to be necessary to make it a perfect act, for I thought Mr. Day might die before Mr. Simpson could arrive, and Mr. Day himself thought that he was about to die. I took possession of the codicil after it was executed until Mr. Simpson came, when I delivered it to him. Mr. Day was of perfect sound mind, memory, and understanding, throughout the transaction ; he talked rationally

and sensibly altogether on the subject, he perfectly understood everything which passed, and was fully capable of giving instructions for a codicil to his will, or of doing any act requiring thought, judgment, and reflection." He says "he did not desire me to keep the codicil till Mr. Simpson came; I did that of my own accord, and then gave it to Mr. Simpson, who read it in my presence, and said that it would do very well. I wanted him to prepare a more formal codicil, but he would not do that, and assigned a reason for it." And then a circumstance occurs, which shews the deceased's recollection, and that his conduct was rational and sensible; "He called Mr. Day's attention to the circumstance of there being another bond which he had heard of; Mr. Day was reluctant to admit that there was such a bond, but at last he did admit it, and said that that bond had been destroyed, and the child was dead."

From the evidence given by this gentleman, and from the circumstances which occurred on this occasion, nothing can be more clear, than that this was the act of the deceased himself, for the persons about him had no previous notion of the existence of the three natural children. The deceased for some reason or other, had kept it a secret from all but one or two individuals. But during the whole transaction, the deceased is perfectly rational and attentive; he gave directions for this codicil, and thereby relieved his mind of a weight which was upon it; and perhaps there was some reference to this intention on the 3rd September, when he called for Mr. Dufaur and Mr. Shaw to attest the alterations of the will; for Mr. Simpson says there

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appeared to be something on his mind, which he could not come to a resolution to disclose. But it is clear from the evidence that the deceased was rational and sensible on the occasion, and even if the case had been less clear, the codicil is an act so natural, that of providing for such children, that the Court would not hesitate in pronouncing for it.

But the case does not rest heré. Not only is there proof that the deceased at the time was rational and sensible, but at a subsequent period he enters into conversation with others on the subject, declaring what he had done, and that he was satisfied with it. And though the evidence of Mrs. Peake is the only proof of a previously expressed intention of providing for his illegitimate children, he had made a provision for them in 1832, by post obit bonds of 5,000*l.* for each child. She deposes that the deceased at that time declared his intention of making a further provision for them. The evidence of Mrs. Peake is extremely strong on this point. It appears that the deceased being anxious that the children should be identified, a letter was written to Mr. Weston, by the deceased's desire, directing that the children should be brought to town, and this is forwarded to Mr. Osborne, one of the clerks at the deceased's establishment at Holborn, Mr. Weston himself, the deceased's brother-in-law, being unwell at the time. The children, who were at Margate, were accordingly brought to London by Mrs. Peake, and she saw the deceased on the 15th of September, and had a long communication with him. But previous to this Mr. Weston and his wife (the sister of Mrs. Day) had visited the deceased, that is on the 11th

of September, the day following the execution of the codicil and the sending for the children. Mr. and Mrs. Weston have both given an account of what passed between them and the deceased on that day. He enters into conversation with them on the subject of these illegitimate children, and of what he had done; he expresses himself satisfied with the act—the execution of the codicil,—that he should die happy in having done what he wished to do; and they depose to the deceased being at this time of sound mind, memory, and understanding. On Monday, the 12th, when Mrs. Mary Day, the deceased's sister who attested the execution of the codicil, was about to leave Edgeware, she asked whether he remembered what he had done, and he entered into the subject with her, and expressed himself satisfied with what he had done. The bonds have been produced, dated in 1832, and witnessed by Susan Peake and Robert Barbrook, who was employed in collecting the deceased's rents, and was also a clerk in his establishment.

The deceased on this occasion evinced no want of recollection; he adhered to the disposition contained in this codicil, and (though he was at this time in a state of fluctuating capacity,) the matter originating with himself, the codicil being executed by him in the most rational manner, and he retaining a recollection of it for many days after, I am clearly of opinion that this paper is entitled to probate. But some circumstances connected with the execution of this codicil are,—the effects of them—not confined to this particular transaction; I think they bear very materially on what sub-

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sequently took place as respects the character of the deceased, and the effect produced on his mind by the several attacks. Notwithstanding the evidence of Dr. Clutterbuck, that he became confused after a short conversation with him, during which however, he was enabled to recollect names, and to answer questions consistently and rationally, and for a time appeared capable of business; notwithstanding this evidence and the evidence of other witnesses as to the frequency of the return of the periods when he was in a state of confusion and incoherence, the evidence shows that when the fits had withdrawn, he could concentrate his thoughts and conduct himself consistently and rationally for a considerable period of time. During the instructions for the codicil, and the communication respecting the children to Mr. Foote he conducted himself in a perfectly rational manner, and his recollection of the circumstance, and the frequency with which he referred to it, shewed that his general capacity was not so low as in the opinion of many of those about him, and even of Dr. Clutterbuck himself, it was supposed to be. It appears according to Mr. Weston, that a conversation took place between the deceased and him, on the 11th of September, in which he referred not only to the codicil but to other matters of business. Mr. Weston had been travelling to Manchester on business connected with the manufactory, and he had a long conversation with the deceased on this subject, so that he was capable of attending to business for a long time together, according to Mr. Weston, and there is no reason why the Court

should distrust the account given by this person, though he states that there was a longer period before a change took place.

But it appears that on the afternoon of the 11th, Mr. John Simpson visits the deceased. He was sent for in consequence of what had passed, and he saw the deceased on that day, that is on the very day that Mr. Weston and Mrs. Weston had a long conversation with the deceased, in which he was perfectly rational, and conversed for a considerable length of time. He went to Edgeware by desire of the deceased, as he was informed by his father, in consequence of the disclosure of the secret as to the three illegitimate children, and the execution of the codicil which had taken place. He states that Mrs. Day was extremely anxious that the deceased should be prevailed upon to annul the codicil, and make a provision for the children in some other way. His evidence is given on the 5th article of the allegation, and it is not immaterial for the Court to refer to it, not so much with reference to this transaction, as to the execution of the last codicil of the 22nd of September. Mr. Simpson states that he saw the deceased both on the 11th and 12th of September, that he attended him on both occasions on the subject of his making a provision for his natural children, of whose existence he had recently made a disclosure. He had not seen him since the 3rd of September, which was soon after the first attack of the 26th of August. He says he tried to draw the deceased's attention to the subject of the codicil, but that he could not get one word from him on that or any other subject. "At the earnest desire of Mrs.

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Day and Mrs. Clagett, his wife and daughter," he says, "who were in great distress at the disclosure just made in respect to the natural children, and who to avoid the exposure were most anxious that the codicil just executed by Mr. Day in their favour should be annulled, and provision made for them in some other way; I made one or two further attempts in the course of that day to get Mr. Day to enter upon the subject, but I was unable to get a word from him." It has been said, that this is altogether inconsistent with the account given by Mr. and Mrs. Weston, for if it be true that the deceased was in this state when Mr. Simpson saw him, it is extraordinary that he should have had so much command over himself, and have evinced so much recollection and consistency as to be able to enter into the topics he did, and to discuss matters of business with Mr. Weston, (as to his journey to Manchester,) and to talk with Mrs. Weston on the subject of his natural children, on the very day when Mr. Simpson saw him. But I am of opinion that these accounts are not inconsistent one with the other. The communication between the deceased and Mr. Weston had probably taken place in the early part of the day, when the deceased's mind was in a state of clearness and vigour; after this (Mr. Simpson's visit being in the afternoon of the day) he had relapsed into that state of incoherence and confusion of mind and recollection, into which, as appears by the evidence of Dr. Clutterbuck, he was in the habit of relapsing, and therefore the evidence of Mr. and Mrs. Weston is not inconsistent with the account given by Mr. Simpson, looking to the state the deceased was in

during the latter part of his life especially. When the conversation took place with Mr. and Mrs. Weston he was rational and coherent ; he then became confused and incoherent, as is stated by Dr. Clutterbuck. Therefore there is no reason to discredit the account given by Mr. Weston of the conversation which took place on the 11th September. Now on the 12th September, Mr. Simpson saw him again, on the same subject ; he says, “ I did get him to speak, but he talked in so irrational a manner, that I could do no more with him than I had done the day before. Upon my going up to him the second day, I said something to him to this effect :— ‘ So, Sir, you have been making a codicil, I understand, for the benefit of your natural children.’ Upon my saying this, he looked at me savagely, and said ‘ No, John, bonds, and I will have more.’ He then repeated the word ‘ bonds ’ several times.” So that in this conversation with Mr. Simpson, on the 12th September, here is a reference to the provision he had made for them in 1832, as if he had forgotten that he had made a further provision for them. But though he might have forgotten this at the time of his conversation with Mr. Simpson, this is not inconsistent with the statement of Mr. Weston, that the deceased was at the time in a state of perfect recollection ; and it is not inconsistent with the state of the deceased ; that the account given by Mr. Simpson should also be accurate, when he says “ I then tried again to bring him round again to the subject, saying to him something to this effect : ‘ Now, Sir, can’t we make some arrangement and do away with that codicil ?’ He gave me no answer to this, but began telling me

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that he had a great deal to say to me, and then he went on to ask me several times, in the most childish way,—how long I could stay, and how long it would take me to walk up to town ;—‘ Now, John,’ he kept repeating, ‘ how long can you really stay ?’ After this I made another attempt to get him round to the subject of the codicil, asking him if we could not invest the money in the funds for the benefit of the children, upon which he said quite petulantly ‘ Why ?’ I told him that he should do it to save the feelings of his wife and daughter. He made no reply to the observation, but addressing me abruptly, he said, ‘ You shall have the carriage, and go to Pine-Apple Gate ; but tell me how long it will take you to walk up to town, and what is the latest moment you can stay ?’ Whilst running on in this way, the doctors were announced, and I left him for the time. Nothing further passed on the subject of the codicil, or the provision for the natural children, either on the part of Mr. Day or myself. Finding that in the state he was, it was hopeless to fix his mind to any rational point for a second, I made no further attempt to renew the subject with him.” Now this is the account of what passed on the 12th September, between Mr. John Simpson and the deceased. It does not at all conflict with the evidence of other persons. It is very possible that though at the making of the codicil, he expressed himself rationally on the subject, and approved of what he had done, this should not conflict with the evidence of other witnesses, and of the servants, Hunt and Barton. Barton says, that he suddenly flew off,—and he might at this time have been in that state of confusion mentioned by Dr. Clutter-

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buck, and by other witnesses, and which the pa exhibited in the cause show, did frequently place. This communication with Mr. Simpson shows, however, that there was on the mind of deceased a considerable effect produced by disorder under which he laboured.

On this account given by Mr. Simpson, some observations have been made pressing on the character of this gentleman as to the purpose for which he has come forward to give evidence in the cause. These observations are calculated to produce painful reflections in the mind of this gentleman; and but justice to him to say, that, as far as the Court is able to judge from the evidence, he has not rendered himself liable to a just suspicion of any design to give an inflamed and exaggerated account of the state of the deceased, or any representation other than the facts and circumstances would justify. What is the motive ascribed to this gentleman? Why is he said to have a personal interest to state facts contrary to the codicil propounded by Mr. Dufaur, in which Mr. Dufaur is appointed an executor, with a legacy of 500*l.* free of legacy duty, and in which Mr. Dufaur is continued in the collection of certain rents and annuities in London as during Mr. Deane's lifetime. By a codicil executed by the deceased appropriating a large sum of money to the foundation of an asylum for blind persons, there is a direction that his trustees shall allow to a secretary or clerk a salary of not less than 100*l.* a year, and it is suggested that if Mr. Dufaur, who is executor by the codicil propounded on his behalf of the 22nd September 1836 is appointed, it may interfere with the prospects of Mr. John Simpson, who has a bet

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chance of an increase of salary from the other executors, one being his father, and the other persons on terms of intimacy with him. Really looking to the remote contingency, the remote expectation on which Mr. Simpson is supposed to have acted in this cause, in giving an inflamed and exaggerated account of the deceased's state, it is far too slight to lay any just foundation for the charge which has been made against him. But it does not rest solely on Mr. John Simpson. The imputation must go further, and rest upon the executors and trustees of the trust fund ; and it implies that Mr. Underwood and Mr. Croft would not be unwilling to lend themselves to an abuse of the trust reposed in them by the deceased. What right has the Court to suppose that either of these gentlemen or Mr. Pinder Simpson, the father of Mr. John Simpson, should be so forgetful of their duty in the trust they have to execute, as not to discharge it with honesty and perfect integrity ? What right has the Court to suppose that they would make an addition to the salary of Mr. John Simpson (it is directed by the codicil of the deceased that he is to be the first clerk, so that this is not at the option of the trustees) contrary to the wishes and intention of the testator ? Really the bare statement of the circumstance makes it appear so improbable that it is hardly deserving that the Court should take notice of it ; but I have thought it right to counteract the effect of the observation if it should go abroad, and to protect the character of this person, who appears to have conducted himself with perfect integrity.

It is now necessary for the Court to consider what was the character and state of the deceased

between the 10th and 22nd of September, with reference to the testamentary act now more immediately before the Court,—it is immaterial, I to consider what was the state and condition of deceased according to the accounts given by several witnesses as compared with the account given by Mr. John Simpson.

Mr. John Simpson has given a general account of the state of the deceased on the third article of the allegation. He speaks to his general character in the early part, and he goes on to depose that on the 3rd September, he was quite struck with the failure of memory he evinced. “His whole conduct,” he says, “and demeanour on every occasion of my being with him from that time, manifested to a greater degree on each successive day the impaired state of his mind.” Dr. Clutterbuck says the same thing, that is, that he became inconsistent, incoherent, and confused at much shorter periods of time than previously. On some of the said occasions, when I was with him, he would remain perfectly silent, and not utter a single word for an hour together. On others, and as more generally happened, he would run on from one subject to another, asking questions, and making a number of unconnected remarks of the most absurd and irrational nature. He would begin, perhaps, by asking some question, or making some remark of a rational nature, such as making inquiry after his family or something of that sort, and then, the next moment after, without waiting for a reply, would abruptly change the subject, and make some absurd inquiry, such as ‘What is the price of herrings?’ or ‘What sort of a crop of apples

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there?' or he would run off with a series of remarks perfectly unconnected and irrational to the greatest degree. After harping on some ridiculous idea, that poison had been put into his food, and that he was to have his legs cut off to let out the poison, so that he might be able to walk, or some idea equally irrational; he would sometimes run on in this way for a length of time together. This was the more striking in him from his having been, before his illness, a man who never said a word more than was necessary, and then what he did say he expressed in the most clear and forcible manner. There is a paper somewhere in this cause, it is one of the testamentary papers, or scripts I believe they are termed, upon which, on one of the occasions when I was with Mr. Day during his illness, I in his presence and from his own mouth, unknown to him, took down with a pencil, and afterwards traced over with ink, a number of remarks and questions made and put by him at the time, and the contents of which paper show the impaired and weakened state of his mind, and is a specimen of the mode in which he conducted himself on the various occasions of my being with him during his illness." And this paper is annexed to the affidavit of scripts of one of the Executors, and marked (H) and which is dated on a day not immaterial, the 24th September, two days after the execution of the codicil propounded by Mr. Dufaur. The conversation detailed in that paper occurred on the occasion of my taking down from Mr. Day, at his desire, and to avoid irritating him, some instructions for a codicil dictated by him, of the most absurd and unintelligible nature, and which were taken down on the

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same paper." It is not necessary for the Court to refer to the paper. It does bear the character given by the witness, and if written down from dictation of the deceased on this occasion, it proves that the deceased was in a most incoherent and confused state of mind at the time. "Through his illness, Mr. Day was for ever going on talking in some absurd unconnected way, constantly ridiculous and irrational, and very often perfectly unintelligible. He would frequently run on to me about his bills and his bonds, and more particularly his will; he was for ever telling me that he must have a new will, and saying that he would nullify the residue,—that was an expression frequently used on the subject." We shall see presently whether by the other witnesses this account given by Mr. John Simpson is not confirmed. It is impossible to remember the absurd trash which he would keep repeating over and over again about his will and his bonds. What he said on these subjects was always unconnected and irrational to the greatest degree; and yet at the same time he gave you the idea that he had something floating in his mind which he could not bring to maturity. In fact his mind, which before his illness was clear and decisive, was now in a state of confusion altogether. One mode in which the impaired condition of Mr. Day's mind was shown during his illness was by the ridiculous orders which he used to give to his servants and others. I remember, for instance, hearing him, on one occasion, order his coachman to take his carriage to town and bring it back in it Mr. Hopkinson, his coachmaker, and six tradespeople. I have at other times heard

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tell his coachman to take the carriage to Pine Apple Gate, and then turn round and bring it back again." He goes on to describe the manner in which the deceased conducted himself and expressed himself during the time at which Mr. John Simpson saw him: he says, "He may have made occasionally a rational observation, and have appeared rational for the time, but as far as came within my observation that never lasted above a moment or two, and then the subject was gone. He never that I witnessed, during his illness, could carry on any subject rationally beyond two sentences. That such as I have described Mr. Day's state at the period in question was known to all his family and those who had access to him, as well as to his medical attendant, there is not a doubt. It was the subject of open conversation throughout the whole establishment, both in the family and among the servants." And he goes on to depose; "On the 12th September, when I was at Mr. Day's house, I conversed with all three of his medical attendants, Mr. Hewson, Mr. Foote, and Dr. Clutterbuck, as to the state in which he was, and they all three concurred in the opinion that he was at that time perfectly childish, and unequal to transact any business." Here again it is said that Mr. Simpson is contradicted by Dr. Clutterbuck; that he never expressed any opinion of the general incapacity of the deceased, whereas, in his deposition, Mr. Simpson has stated that Dr. Clutterbuck told him so. He says that all the three medical attendants at that time concurred in opinion that the deceased was in a state of incapacity; and in answer to the 3rd interrogatory,

Mr. Simpson says, with reference to this
 “By reference to my notes of the v
 conferences I had with the said medical
 during Mr. Day’s illness, I am enabled to c
 to the very days when they severally express
 me their opinion that he was not in a sta
 transact any business; on the said 12th of
 tember they all three jointly gave that opini
 me; on the 16th, the 24th, and the 26th of
 month, Mr. Foote each day expressed that op
 to me; and on the 8th of October following
 Clutterbuck and Mr. Hewson, on my calling
 them at their houses, severally gave it as
 opinion that Mr. Day’s mind was all but gone
 that he was totally unfit for any business.” I
 fess I see no contradiction of Mr. Simpson’s acc
 in what is stated by Dr. Clutterbuck, Mr. Hew
 and Mr. Foote, as to their opinion of the sta
 the deceased. Dr. Clutterbuck saw him at inter
 for a short time, ten or twenty minutes, and du
 part of that time he was competent to answer q
 tions, but afterwards he became confused and
 coherent; and all that Mr. Simpson says is, t
 on the 12th of September, Dr. Clutterbuck decl
 to him that the deceased was perfectly incompe
 to do acts of business, and that Mr. Foote said
 same on the 16th, 24th, and 26th; and it is
 possible to look at Mr. Foote’s evidence and
 see that he is of opinion that the deceased
 altogether incompetent to do any act requir
 thought, judgment, and reflection; and a per
 of Mr. Simpson’s credit cannot have meant to
 pose contrary to the fact, when he stated that
 Clutterbuck, Mr. Foote, and Mr. Hewson concur

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sequently took place as respects the character of the deceased, and the effect produced on his mind by the several attacks. Notwithstanding the evidence of Dr. Clutterbuck, that he became confused after a short conversation with him, during which however, he was enabled to recollect names, and to answer questions consistently and rationally, and for a time appeared capable of business; notwithstanding this evidence and the evidence of other witnesses as to the frequency of the return of the periods when he was in a state of confusion and incoherence, the evidence shows that when the fits had withdrawn, he could concentrate his thoughts and conduct himself consistently and rationally for a considerable period of time. During the instructions for the codicil, and the communication respecting the children to Mr. Foote he conducted himself in a perfectly rational manner, and his recollection of the circumstance, and the frequency with which he referred to it, shewed that his general capacity was not so low as in the opinion of many of those about him, and even of Dr. Clutterbuck himself, it was supposed to be. It appears according to Mr. Weston, that a conversation took place between the deceased and him, on the 11th of September, in which he referred not only to the codicil but to other matters of business. Mr. Weston had been travelling to Manchester on business connected with the manufactory, and he had a long conversation with the deceased on this subject, so that he was capable of attending to business for a long time together, according to Mr. Weston, and there is no reason why the Court

The fit came on about ten o'clock at night Monday, the 12th of September. She says "The first of these silent fits came on about o'clock at night of Monday, the 12th day of September, and it lasted till about four o'clock on Tuesday afternoon :—" that is about eighteen hours, and Hunt has also deposed to the same effect. In the time these silent fits lasted she says "he sat in his chair and not say a word, nor would take any nourishment, nor let any thing be done for him, but sat apparently in a childish state. And the account which Hunt gives, on the same interrogatory, is this :—" I did not consider that it was a fit which Mr. Day had between the 9th and 10th of September last. He was very ill, but collected. He woke up and thought he was, &c. On the night of the 12th of that month, he sat nineteen hours without moving or speaking. He could not be induced to move or speak, or do anything whatever. I think he was at times after in complete possession of his memory and mental faculties"—he marks that as a period when no material alteration took place in the state of the faculties of the deceased,—“but not for any length of time together.” “His mental faculties were greatly impaired at first, but they gradually grew worse and worse, and the failure of them showed itself in various instances; and I am certain that the state of Mr. Day was such as I have stated from and after the 12th day of September.” There are persons on whose evidence the Court is inclined to place reliance, as it is given with great fairness. Barton appears to have given a fair representation as to the deceased's state of mind, according to

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impression as to how the deceased was at the several periods of time. According, therefore, to this account, the deceased at this period of time sat in a silent state without uttering a word ; on the 11th, when Mr. Simpson saw him he talked incoherently, before the silent fit came on on the 12th of September, in the way he has represented. But this was not the only silent fit, there was one on the 16th of the month. Barton says, the second silent fit began at half-past nine at night of the 16th, and continued until three o'clock the following day. She says—"The effect of the fits, both the epilepsy and the silent ones, was to weaken and impair both his mind and memory ; that is to say, at times ; but even up to the day of his death he was at times just as rational and sensible as ever ;" concurring, therefore, with the opinion of Dr. Clutterbuck. But these silent fits of the 12th and 16th of September were no slight evidence of the effect, the increasing effect, of the disorder on the mind of the deceased. It is clear, that at this time, the 12th and 16th of September, the date of these silent fits, (one lasting for eighteen hours, the other from nineteen to twenty hours), the deceased's state of capacity was not the same when the silent fits subsided. It is not like the epileptic fits, which rendered his mind impaired and confused, but, when the effects went off, his mind remained perfect ; but here, for nineteen or twenty hours, he is visited with a silent fit, during which the deceased sits in his chair in an irrational state, not uttering a word, or taking food, or suffering anything to be done,—his mind unconscious of everything passing, incapable of

rational conversation, or of any rational act ; fore on the 12th and 16th, the disorder increased very rapidly, and become of a much serious nature.

But, in point of fact, what effects did it produce ? Why, Barton says, that after the 12th of September she observed many instances of incoherent, irrational and childish behaviour in the deceased. He would give the most nonsensical orders and directions : for instance, he one day, about that time, but I cannot name the day precisely, ordered that four large clothes'-horses to be made of linen to be hung on in the kitchen, because he himself, and all of us, could then sit by the kitchen fire without scorching ourselves. He would be talking nonsense of this kind for an hour or more, then he would go off to sleep, as if from exhaustion, and wake up again in an hour quite refreshed, his mind and memory perfectly collected, and he would remain three or four hours, and then he would go on with his nonsense ; and so he kept on sometimes foolish, and at others quite rational, until his death." So that, at least, he was in a state of fluctuating capacity. She says, she was with him on the evening of Saturday, the 1st of September, that follows immediately the abatement or cessation of the silent fit, "he told Hubert Butler, and myself, who were in attendance on him, that he meant to talk to us till five o'clock in the afternoon, and he should then only communicate with us by dumb-show. However, the clock struck six, I think it was six"—and what did the deceased do ?—"he then began counting thus—two and two make three, and so on, till he got to three

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and then began again, and he bid me help in counting, and then he desired the butler, but neither of us could do it to please him; so he sent for Mr. Clagett who was in the house, and he could not do it right, so he set-to again himself, and then he made the butler try again, and kept him on at it, without stopping, for a quarter of an hour; at last he exclaimed, 'There now, you have done it at last—that's just what I mean; how stupid they have all been!' This sort of game went on for three hours, until the deceased had completely worn himself out with fatigue; and, after all, it was not any calculation,—it was nothing but merely counting after his fashion from 1 to 36. He did at times give incoherent and ridiculous orders that could not be obeyed, but they were not frequent. The fact is, the house in Regent's Park, (Harley House), was undergoing a thorough repair, and the deceased had always been in the habit of giving the orders himself for everything that was wanted." I only read this to show that the account of Mr. Simpson is corroborated by all the witnesses. He speaks in general terms of the state in which he saw the deceased from the 3rd September till the last time he saw him before he died; and I read this to show that he has given a probable and accurate account, and that he is confirmed by Barton:—"and he would sometimes order the carriage to be sent up to London to fetch the principal tradespeople down, in order that they should have beds and be made comfortable; and the arrangements at Harley House seemed to be much upon his mind, and he would give directions about the tradespeople there, and so on, which he

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markably strong and retentive memory. During his illness after the 10th of September, it was the practice of those about him to appear to yield the same obedience to him as before, but when withdrawn, to pay no attention to what he said or ordered. Sometimes he forgot altogether what he said or ordered; he was treated as a child in that respect." Now, I say, it is quite impossible, reading this evidence, to say that Mr. Simpson's account is an inflamed or exaggerated account. It is said that Mr. Simpson has not fixed the exact date of the occurrences, as the other witnesses have done, and that if the deceased was at this time liable to such complete aberration of mind, such unconsciousness and forgetfulness of what passed, it is impossible that any act done by him could have had effect; but his state was such that it required to be particularly watched, to see whether it was a rational act rationally executed; whether or not he was sufficiently master of himself, even a short time after the access of the disorder, to be enabled to do an act capable of having operation.

But another effect of the disorder of the deceased after the 10th of the month, according to the evidence of Hunt, on the third interrogatory, is this:—"Previous to and about the middle of the month of September, he often talked of his affairs; he never did talk of his affairs before the 10th of that month, never on any occasion." And it comes out in the evidence of Barton, on the eighth interrogatory, that, "after the first silent fit the deceased was in the frequent habit of talking about making new wills, and of having Mr. Simpson down about making a will for him; and whilst he was in these moods,

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and more particularly during the last three of his life, he talked a great deal about giving considerable sums of money to various persons, he had got more money than he knew what with, and that I should have 200*l.* per ann he should like me to be able to go to a wa place every summer ; he asked Mr. Foote, o just before he died, how much he would l have, whether 500*l.* would satisfy him ? A made similar inquiries and observations to persons ; amongst others I recollect, on th October, Mr. Bull came down, and the de told him he was going to make a new will, a quired if 500*l.* would satisfy him. He used times to order his book in which the bills change were entered to be brought and read t during his last illness, and would evidently be a mistake respecting the time at which so them became due, and he, during the last weeks, used to say he wanted to see Mr. Bul Mr. Dufaur about money matters, and bonds such like, and that they must not be kept away him ; indeed, these matters were evidently u most in his mind at the time of his being in a of wandering and irrationality, which, as I already stated, he was at intervals subject to. vious to his last illness, the deceased was particu reserved and close about his affairs, and so he tinued up to the time of his death, except whe was labouring under the temporary attack weakness of mind, to which he became subject the first silent fit on the 12th September, 18 And I think it appears from the evidence of Foote, to which the Court will not particu

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refer, as the other party has not had an opportunity of cross-examining him, that this gentleman, after the 12th September,—indeed, after the 10th, but certainly after the 12th,—was in a state of mind very different from what he had been in before; that he was in the habit of talking of his affairs, which he had not been before, of making an alteration of his will, and of sending for his book of bills and bonds, in respect to which he was in the habit of employing Mr. Dufaur. It certainly shews that an alteration had been produced by the disorder, and that the mind of the deceased required to be watched with great caution.

It appears that, on the 18th of September, Mr. Bull, a surveyor, employed in respect to certain repairs at Harley House, visited the deceased on the subject of a lease; and, in the first instance, he was refused access to the deceased by Mrs. Day and Mrs. Clagett, his wife and daughter; which has been argued to be an improper act on their part, as if they wished to make it appear that the deceased was not at this time in a state to see persons on business; but he did get admission to the deceased, and transacted business with him. Mr. Bull has not entered into a detail of the matters which occurred between him and the deceased; but he says he did transact business with him on that occasion, having acted on the instructions he received from the deceased. Considering when the visit of Mr. Bull took place, it is not very extraordinary that the wife and daughter should have hesitated to let the deceased be troubled with any business whatever. It was the day after the second silent fit, and the counting fit, which lasted for

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three hours—the very day afterwards. But comes out in the course of the evidence of Mr. Bull? The object of the visit was the delivery of the counterpart of a lease. I do not understand that there was any other business. And it appears that on the 20th, the day but one afterwa letter is written by Mrs. Clagett, under the direction of the deceased, shewing an evident confusion of his mind; and considering the extraordinary accuracy of the deceased's memory, when in the possession of all his faculties, that it was so greatly enabled him to repeat a long account, and the order of it in the order in which they were set down, shewed an incoherency and confusion in his mind, evidently the effect of the disorder under which he was labouring, and which was an affection of the brain, producing the ordinary results of such disorder.

Annexed to the deposition of Mr. Bull is a letter of the 20th September, written by the direction of the deceased, and with reference to the delivery of the counterpart of the lease; and it was evidently a confusion, as Mr. Bull states, in the mind of the deceased on the subject. It is necessary for the Court to point out the confusion which, though slight in itself, is not slight when considered as the act of a person of so accurate memory as the deceased; I refer to the letter leading up to the visit of Mr. Dufaur on the 20th September, immediately preceding the execution of the codicil. But before I proceed to the evidence as to this codicil, it is proper to consider the situation of Mr. Dufaur with regard to the deceased, and the alteration of the will by the addition of Mr. Dufaur.

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name as executor with Messrs. Underwood, Croft, and Pinder Simpson.

Mr. Dufaur is a solicitor in this town, and I understand that it is not intended to throw any imputation on his general conduct and respectability. All that is intended by the interrogatories is to show that the business in which he was employed by the deceased was not of the same confidential nature as that entrusted to the management of Mr. Simpson and his son ; that is, that they were inferior matters in point of value of the property concerned, and different in other respects from the more confidential commissions received by Mr. Simpson and his son from the deceased. This gentleman was, in the lifetime of Mr. Day, employed occasionally in lending money on mortgage—(there is one bond for 6,000*l.*)—on other occasions in discounting bills, and laying out money in the purchase of life annuities, whilst the deceased employed Mr. Simpson and his son in transactions of much greater magnitude and moment, and in investments of much greater value than those entrusted to Mr. Dufaur, though considerable advantages were obtained by the deceased by means of Mr. Dufaur's employment ; and there is no reason to suppose that Mr. Dufaur led the deceased to the modes in which his money was employed ; for the deceased had a capacity to judge for himself as to the most advantageous mode of employing his capital, and he only employed Mr. Dufaur in carrying his schemes into effect. It might be (as indeed it must be in all such cases) that the deceased suffered considerable losses, from the manner in which Mr. Dufaur, under his own superintendence, invested

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his property. With the family of Mr. Dufaur deceased was intimate in the first instance appears from the evidence of Mary Day states that the deceased became acquainted with the uncle of Mr. Dufaur when both of them were at the Custom House ; the acquaintance was broken off but a grateful recollection of it remained, and he gave some advice which the uncle of Mr. Dufaur acted upon given to the deceased. He was also acquainted with his father, and probably determined to do something for the son's benefit. It appears that Mr. Dufaur had for some years—six or eight—been employed in the way I have described : and in the last year and a half, on the illness of one of the clerks of the establishment in Holborn, Mr. Dufaur was employed by the deceased in collecting currents in London, at a commission of two and a half per cent., and he continued till the death of the deceased in the habit of occasionally visiting him. It appears in evidence that he accompanied persons who went to the strong room in the Custom House, where the deceased's papers were kept, and of which Mr. Dufaur, with a clerk, was employed to make an inventory ; and he had access to the strong room when papers were wanted with respect to the business on which he was employed. Under the circumstances, I am not prepared to say that it might not be a rational act for the deceased to appoint Mr. Dufaur, executor : I see no reason, from the evidence, why the deceased thought proper so to do, why he should not have appointed Mr. Dufaur with the other gentlemen named in the will. But the question for the Court is, whether he did appoint Mr. Dufaur an executor.

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tor; whether the deceased did the act himself, knowing what he was doing.

Mr. Dufaur had been sent for by the deceased, on the 3rd September, to be a witness to an alteration in his will; at that time, therefore, Mr. Dufaur must have been, to a considerable degree, in the confidence of the deceased, to the same extent at least as Mr. Shaw, also a Solicitor (one of nine, I believe,) employed by the deceased. He was sent for by the deceased to be a witness. Mr. John Simpson is sent for to make the alteration, and Mr. Dufaur to be a witness. But on the 20th of the month, the deceased writes the letter to Mr. Bull (to which I have referred), in which, I think is this passage:” Mr. Day observes that Mr. Bull has still 112*l.* 10*s.* to pay for interest to Midsummer, which he particularly requests Mr. B. will do to-day;” though, in fact it was not due; “and send word by the bearer if Mr. D. may rely on his so doing. Also, say if Mr. Dufaur may be expected on Thursday,” that is, the 22nd. “Dinner at five o’clock, and a bed at his service; reminding him of the long stages from the Green Man and Still from half-past two till half-past three o’clock; that he will be wise to take advantage of the first that will take him.” This visit of Mr. Dufaur, therefore, was in consequence of an invitation expressed by the deceased himself. That letter was shown by Mr. Bull to Mr. Dufaur; and Mr. Dufaur, being anxious to return to his family at Brighton, goes on the 21st instead of the 22nd, and remains at the house during the night of the 21st. What particular purpose the deceased had in view in wishing to see Mr. Dufaur, does not appear in the

evidence, whether it was connected in any degree with any of the investments of the deceased, or any purpose connected with the will, or any other, there is not a trace in the evidence. The visit of Mr. Dufaur is, however, paid on 21st; he sleeps in the house that night, and, during that time, the instructions are said to have been given by the deceased to Mr. Dufaur for the codicil. At the house of the deceased, during that night, Mr. Hewson also slept; and in the course of the evening (as appears by the evidence of Mr. Hewson, who has not only been examined on the allegation given in on by Mr. Dufaur, but on a prior allegation given in by another party,) on the evening of this 21st of September, Mr. Dufaur communicated to him the intention of the deceased, that he (Mr. Dufaur) should be an executor of his will. The next morning, when the family was at breakfast (Mrs. Day, Mr. and Mrs. Clagett, and Mr. Hewson), according to the evidence of Mr. Hewson, the subject was renewed. He says, "I very well recollect that the producent was also then at the deceased's house, and that he slept there on the night of the 21st; and on the following morning, the producent being alone with me in the breakfast-room, just before the family assembled for breakfast, which they did about ten o'clock, he informed me that he had received directions from the deceased to prepare a codicil to his will, and thereby to appoint himself (the producent) an executor of the deceased's will; that shortly after this the family assembled at the breakfast-table; the party consisting of Mrs. Day, the wife of the deceased; Horatio Clagett, Esq., and Mrs. Clagett, his

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wife, the daughter of the deceased, the producent (Frederick Dufaur) and myself. Whilst at breakfast, the producent, in the presence of all the said parties, and addressing himself more immediately to Mrs. Day, but still making the matter one of general communication, stated that he had seen the deceased that morning, and that the deceased had expressed to him a wish that he (producent) should be one of his executors ; and he added that the deceased had assigned as a reason for such wish the circumstance of his being a considerably younger man than the other gentlemen whom he had already appointed as executors ;" so that the communication was made to Mrs. Day, Mr. and Mrs. Clagett, and Mr. Hewson, that the deceased had expressed such a wish, and as far as this goes, there is nothing to contradict it. A good deal of observation has been made on the manner in which Mr. Dufaur made this communication ; but nothing arises from that. From the situation of the deceased, he could have done nothing without the knowledge of the family ; and it cannot be an extraordinary degree of candour and openness on his part, that he communicated this transaction, which could not be concealed from the family, who could have taken steps to prevent it. He goes on : I cannot speak quite positively, but I have a very strong impression that Mrs. Day, in reply to such communication, observed, that if such was Mr. Day's wish, she, of course, could not object to it. Neither Mr. nor Mrs. Clagett made any observation on the subject. A little time afterwards, and before we quitted the breakfast table, the producent asked me if I would act as his

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clerk or amanuensis, or some peculiar term of nature, and fair copy the said codicil, which said he had drawn out in pencil on the back of a letter; and I consented so to do. I am positive that he did not state that it was the deceased's wish that I should do so; he only said it of me apparently as a mere request of his. I then withdrew from the breakfast table to another table at a distant part of the room, and was furnished with pen, ink, and paper. I cannot say positively whether it was by Mrs. Day or Mrs. Claggett, but I am pretty certain it was one of them; certainly it was not Mr. Dufaur. Mr. Dufaur "brought me the pencil draft, and I copied the same verbatim on a sheet of letter paper." So that on that occasion there was no impediment thrown in the way of executing the codicil by Mrs. Day or Mrs. Claggett; on the contrary, they lend aid and assistance as he deposes in the next answer. They all go into the deceased's room to commence the execution of the instrument, and Mr. Dufaur goes on to depose as to the manner in which the codicil was executed. But it is to be observed that the instructions are represented to have been given by the deceased to Mr. Dufaur. No person took the instructions, or was present when they were given to Mr. Dufaur, who saw the deceased in the morning before he came down to the breakfast room on the 22nd September, the day on which the codicil was executed; but it is admitted in the answers of Mrs. Day, that on that morning Mr. Dufaur had seen the deceased before he had come down to the breakfast-room, and a conversation may have taken place between

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as stated in the allegation, and which may, if it did take place, notwithstanding the disorder under which the deceased laboured, be sufficient to establish the codicil. But did the conversation take place? There is nothing but the allegation of Mr. Dufaur himself; for it is not in evidence. Barton does not speak to having seen or heard Mr. Dufaur in conversation with the deceased, or mention anything to support the representation given by Mr. Dufaur in his allegation as to what took place on that occasion. If it did take place, the witness Barton, who was almost constantly in attendance with the deceased, and if she left the room was only in an adjoining room—if, I say, there had been any communication with the deceased in a loud tone of voice, she must have heard it; but she says nothing at all as to anything passing between Mr. Dufaur and the deceased between the night of the 21st and the morning of the 22nd. There is nothing whatever to support the account given in the allegation of what is said to have passed between Mr. Dufaur and the deceased. The transaction is not impossible; it would not be an irrational transaction; but the Court must be satisfied (considering the state of mind of the deceased prior to the execution of the codicil)—that it was his own act, and done with caution and deliberation, and with a full knowledge of the effect it would have on the disposition of his property. We have nothing but a draft prepared by Mr. Dufaur in his own handwriting in pencil, and delivered to Mr. Hewson for the purpose of being copied; and the knowledge of Mrs. Day, and Mr. and Mrs. Clagett, of the paper from which the codicil was to be prepared

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for execution ; and it remains to be seen what in the absence of proof of the instructions themselves, the manner of execution is sufficient to supply this defect of evidence. What are the facts? The parties assembled in the breakfast-room went upstairs into the room of the deceased, who was sitting in his chair dressed, and Mr. Hewson, (in the presence of Mrs. Day and Mr. Clagett) said to the deceased, "I have prepared a statement in compliance with the request of Mr. Dufaur, and I read it to you, Sir?" He goes on to say, "The deceased signified his wish that I should read it to him by nodding his head in token of assent, being his usual mode of signifying assent ; I then read the codicil to the deceased in the presence of the aforesaid parties. I read the same as distinctly and clearly as I was able, and the deceased appeared to pay great attention to it. Having completed the perusal of the document, I asked the deceased if that (meaning thereby the said codicil) was his wish, and he then answered, 'Yes,' firmly and distinctly ; and having so done, the producent asked him if he would execute it, or rather sign it. 'Now, Mr. Day, you can make your mark to the right of the paper.' Upon which the deceased, in rather an irritated tone and manner, said, 'Why make my mark? I will sign my name.' And the deceased then himself called Mrs. Day to bring his writing paper, which she did, and the paper being placed thereon, she, as was her usual custom, guided the deceased's hand, and he signed the codicil. I have no recollection whatever of there being any seal affixed thereto ; I have no recollection either of any alteration being made by the producent or myself."

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or any one else, in the attestation clause, in consequence of the deceased having signed his name instead of making his mark ;” (but the witness Barton says there was) “ nothing whatever was said by the deceased as to declaring the paper to be a codicil to his will, or publishing it as such, neither did he go through any form of sealing, nor did he request any persons to attest the execution thereof. I remember that I, Mr. Clagett, and Fanny, Mrs. Day’s maid, did sign our names as witnesses ; but when the latter came into the room, or during what part of the transaction she was there, I cannot recollect. I remember that Mr. Dufaur asked us three to sign our names as witnesses, and that we did so in the presence of the deceased, in testimony of our having been present at the due execution of the codicil by the deceased.” This is the account given by this gentleman as to the execution of the instrument ; that he told the deceased that he had prepared a codicil at the request of Mr. Dufaur, and asked him whether he should read it ; that the deceased nodded by way of assent ; that he read it over clearly and distinctly ; and the deceased, when asked whether it was his wish, said, “ Yes,” firmly and distinctly ; and, according to the account of Mr. Hewson, when he was told that he might make his mark, the deceased said, in an irritable manner, “ Why should I not sign my name ?” But here is not a single expression from the deceased as to recognizing the contents of the codicil. No doubt, if the instrument had been read over to any one of unimpeached capacity, it would be sufficient to supply the want of instructions. But the question is, whether, in the state of the deceased,

there was a sufficient knowledge of the contents of the instrument, when we consider what followed afterwards, and the state of mind in which the deceased was? It is to be observed, that the deceased had, between the 10th of September and this day, three silent fits; that he had been visited during this time by Dr. Clutterbuck, as well as other medical attendants; and that Dr. Clutterbuck states, that though he was clear for about a quarter of an hour or twenty minutes, the duration of this period decreased at each visit, and that on the 20th the letter was written to Mr. Bull, showing a confusion in the deceased's mind and memory, which was so accurate; it is impossible, therefore, that this evidence can supply the want of instructions, the instructions being taken down by the person who is benefited by the codicil, without any communication between him and the deceased on the subject of a will proved by any person who heard any part of it; which the deceased does not recognize by a single syllable implying a knowledge of the contents of the instrument. It is true the instrument was read—merely read, but the deceased's loss of sight made this absolutely necessary; and though the family knew of and assisted in the execution of the instrument, which they might have interfered to prevent if improperly obtained, the deceased's mind had been running, according to the testimony of Barton, on the subject of new wills and the alteration of his will. The account given by Barton of the transaction does not show any material difference from the account of Mr. Hewson. She was not in the room during the whole time—she left it on their entering, according

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to custom, and returned to look after the fire, or for some other purpose, and she overheard a part of the codicil read, and she confirms the account given by Mr. Hewson as to the effect of the paper which was read by him to the deceased.

Now what is the statement given by Mr. Hewson and Barton as to the condition in which the deceased had been? Mr. Hewson says he cannot depose that the deceased was at and during the time of the transaction of sound mind, memory, and understanding; "that is not of perfectly sound mind, memory, and understanding; he was evidently labouring under a state of irritability, not violent, but still different from his natural character; there was also a sullenness about him, and though the distinction is a very nice one, I should say that he did understand what he said and did, and what was said to him, and that he knew what he was about; and I form that opinion from the circumstance of his assent to my reading the paper to him when I inquired of him if I should do so, and also from his observation about signing his name thereto, instead of making his mark; but even that was done in an irritable manner, and I knew that the nature of his disease was such that his mind was necessarily weakened, and I do not consider that at the time of executing the said codicil the deceased was capable of making and executing a codicil to his will, or of doing any serious act requiring thought, judgment, and reflection, his manner was so entirely distinct from his natural manner. He was on this occasion in a highly irritable state, whereas his natural manner was peculiar for his cool, calm, and deliberate

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mode of transacting any business of such importance." And this agrees very much with the general character of the deceased given by witnesses in the Cause.

Now, according to this gentleman's account, was not entirely free from the effects of the disorder under which he was labouring; it appears that his manner was irritable, and Mr. Hewson says that he was in an irritable state, different from his usual manner, which was cool, calm, and deliberate. Then, can I say that the deceased was free from the effects of the disorder under which he laboured, that disorder being an attack on the brain, as was proved by the results on the 12th and 17th, and by the aberrations which the deceased on other occasions so clearly shewed? The witness Bartlett is of a contrary opinion to Mr. Hewson. She says, after having stated that Mrs. Day guided the deceased's hand, and that he repeated words of imprecation—that she looked at Mr. Hewson "for the purpose of ascertaining from him whether she was to sign the paper or not." She says—"I did not ask him in direct terms, 'Am I to sign this?' I looked at him and caught his eye, and pointed to the paper, or placed my finger on it where I supposed I was to sign my name, and Mr. Hewson said, 'Yes, sign it there;' and I did sign it. I have not any hesitation in deposing that, throughout the whole of the time of the circumstances occurring which I have deposed, the deceased perfectly knew what he was about, what he said and did, and what was said in his presence. He could not hear all that was done because of his blindness. During all the time, I do consider that he was of sound

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mind, memory, and understanding. Being in constant attendance upon him, I had, according to my own idea, an accurate knowledge of the state of his mind, and I do repeat, that during all the time of the business of this said paper going on he was quite himself, and that during such time he was fully capable of making and executing a codicil to his will, or of doing any other serious or important act." Now nothing certainly can be stronger than the evidence of this witness as to the state and capacity of the deceased; but unfortunately she does not give to the Court a single circumstance in addition to what had been stated by Mr. Hewson, that the deceased nodded assent, and showed an alacrity to sign the paper (if he had acted so with the former papers, it would have been a circumstance of importance); he does show an alacrity contrary to his usual habit (with the codicils of the 2nd, 3rd, and 10th September) not to make his mark, but in an irritable manner he said, "Why should I not sign my name to the paper?" But Barton, I say, gives the Court no account of any circumstances from which the Court might judge for itself what was the state and condition of the deceased, and come to a conclusion as to the state of his mind when the execution of the codicil took place, not one syllable of conversation occurs between her and the deceased during the morning of that day, nor does she overhear any conversation between the deceased and Mr. Dufaur, when, as represented, the instructions for the codicil were taken down in pencil by him. There are the circumstances of reading over to a person of fluctuating and doubtful capacity, and of his calling for the writing desk, and his

alacrity to sign the instrument which had been read to him ; but there is not one syllable from which the Court can come to a conclusion that he perfectly knew the contents of the instrument.

The Court having nothing else before it—nothing preparatory to the execution of the codicil, let us see the account which is given of what occurred immediately after. Barton states that the deceased, immediately after the execution of the codicil, and before Mr. Clagett and Mr. Hewson left the room began to give directions to Mr. Clagett respecting some game which he was to bring down from London. The deceased lived principally upon game, and always ordered it himself, and it was generally sent down once or twice a week. He desired Mr. Clagett to make memoranda of what he wanted, and I remember that he ordered pheasants, and either Mr. Hewson or Mr. Clagett told him they were not in season ; but he still insisted upon having it written down, and he directed the memorandums to be written part in ink and part in pencil, and kept on giving so many orders, that he detained the carriage at the door for half an hour or more ; and from the manner in which he gave the orders to Mr. Clagett, and his repeating the same directions over and over again, I should say the deceased was not at such time of sound mind, memory, and understanding ; for I remember saying to Mr. Hewson, in reference to the difference in his manner during the time of his giving those directions and what it had been whilst executing the paper, ‘ See how soon he goes off again ! ’ ” So that immediately on the completion of the instrument the deceased gave incoherent instructions to Mr. Clagett, which he

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wrote down, (the paper has not been preserved,) which leads her to the belief that he was not at the time in a state of capacity to execute a will. Mr. Hewson deposes to the same effect, and Mr. Clagett, who was present on the occasion, has also deposed to the same effect, though the Court cannot place much reliance on the evidence of Mr. Clagett, considering the situation in which he is placed, and his relationship to the family. He has not been examined in chief in support of the paper, but on interrogatories; (a) and the only purpose for which

(a) On the fourth session of Easter Term, 1837, the proctor for Mr. Dufaur having prayed publication without having examined Mr. Clagett, one of the attesting witnesses, the proctor for the executors prayed a monition against Mr. Clagett, in order to his being produced for the purpose of being cross-examined on behalf of the executors.

Lushington and *Nicholl* for the executors. A party who propounds a testamentary paper, is bound to produce all the attesting witnesses to such paper, and should he decline to examine them himself, they must at least be produced for the purpose of cross-examination by the other party.

In this case it is said Mr. Clagett is interested, as he is the husband of the deceased's daughter, but if he has any interest at all in the question, it is against the codicil; the interest, therefore, is the wrong way, and Mr. Dufaur having chosen him as his witness, cannot be excused from producing him. Were a party at liberty not to produce a witness under such circumstance, very important evidence might be shut out.

The King's Advocate and *Addams* contra. The prayer of the other party comes to this, that they may be allowed to cross-examine Mr. Clagett, whom they cannot produce as a witness, he being interested to support their case against the codicil.

SIR HERBERT JENNER.

But should Mr. Clagett not be produced, you will have the

the Court attends to Mr. Clagett's evidence is to explain the motive on which he acted in lending

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benefit of his being a subscribed witness to your codicil—without his being examined at all, as the other parties cannot produce him as a witness.

The King's Advocate. If they were to produce him it might be questionable whether we could object to his examination.

In the Courts of Law one of the attesting witnesses alone would be sufficient—and although it is the general rule in chancery that all the attesting witnesses shall be examined, still that rule is subject to exception, and in the late case of *Tatham v. Wright*, (a) in an issue from that Court, the party who set up the will did not examine the whole of the witnesses.

How is Mr. Clagett situated? He is the husband of the next of kin, and is interested to support the will against this codicil, and to compel his production would be smothering the course of justice.

Lushington, in reply. This is the first time that an objection has been taken to producing an attesting witness.

The case of *Tatham v. Wright* is mainly distinguished from this—that was a question as to an issue, and according to the proceedings in Chancery the attesting witnesses are examined there before the issue is directed—therefore the Court knows what the witnesses have sworn; and that was not the case of a devisee filing his bill to have the will established, but it was a proceeding by the heir-at-law. But the witnesses there had been examined, and the other party might himself have examined the witness on the trial of the issue—in this case we cannot produce Mr. Clagett, which also forms a distinction from that of *Tatham v. Wright*.

We submit that the other side have not shewn an exception to the general rule, and if they were excused from producing the witness, the same thing may be done in every case which comes before the Court.

SIR HERBERT JENNER.

The present is an application to compel the production of Mr.

(a) 2 Russ. & Mylne, 1.

thereto, for the purpose of his being cross-examined, although such witness was interested against the codicil.

The party propounding a codicil compelled to produce an attesting witness

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any assistance to the execution of the codicil, for it is certainly an extraordinary circumstance that neither Mrs. Day nor Mr. or Mrs. Clagett offered any impediment to the execution of this codicil.

What are the facts deposed to by Mr. Clagett as to the motives which induced him to attest the execution of the codicil? Why, they are these.

Clagett, one of the subscribed witnesses to a codicil propounded by Mr. Dufaur, in order that he may undergo cross-examination.

It cannot be denied that the general rule of the Court is that a party propounding an instrument must produce all the attesting witnesses to that instrument—if not to examine them himself, still in order that they may be cross-examined by the other party; and the question is, whether the present case forms an exception to that general rule? for although the general rule is as I have stated, still there may be exceptions. It is said that to compel the production of this witness would be defeating the ends of justice—but so far from the production of this witness being detrimental to justice, I think, on the contrary, that his non-production would cause injustice, for the party propounding the codicil would then have an advantage to which he could not be entitled; but if the witness be produced, the question will then arise as to his credibility, because a witness by attesting an instrument does, to a certain extent, pledge himself that the transaction is a proper one.

It is said that it is to be presumed that the witness will not support his own act, but not more so in this than any other case, where a party declines to examine his attesting witness, and in this respect the present case differs from that of *Tatham v. Wright* cited in the argument, for there the party could see what the evidence of the witness would be, as he had already been examined in Chancery. I am of opinion that I must direct Mr. Clagett to appear for the purpose of undergoing cross-examination, and the more so, because the other party cannot produce this gentleman as a witness, he being incompetent; and although the counsel on behalf of Mr. Dufaur say they would not object to the production of Mr. Clagett as a witness against the codicil, still as he would be in law an incompetent witness, the Court would not allow it.

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That the deceased was a person impatient of contradiction ; that what was to be done must be immediately, without delay or remark ; that he was in the habit of dictating to persons what was written down, and it was immediately taken down on paper, and that he had done this on very many occasions (on the 24th September, two days before this transaction, there are some directions in respect to alterations of his will) ; that he continued to do so on all occasions, and some of these directions have been produced, and they contain most inconsistent and incoherent directions ; that in consequence of this, and of the deceased's habit of acting from a consideration of the delicacy of his situation, he consented to witness this alteration of the will. Mrs. Clagett having learned from Mr. Foote that in respect to the deceased's capacity, and with regard to any transactions in regard to testamentary business, and according to the evidence of Mr. Foote, he had expressed to Mr. Clagett in a letter which has been produced, (it having been destroyed), that in the then state of the deceased, any act of business which he might perform might be set aside by the evidence of himself, Dr. Clutterbuck, and Mr. Hewson, they were satisfied he was not in a state to transact business. It appears from the evidence of B. and Hunt, that on many occasions, when the deceased was in a state of wandering and aberration, he gave orders which were inconsistent and incoherent, and which were not possible to be obeyed, but they pretended to obey, and when the orders were dictated and taken down in writing the deceased was satisfied with it. Therefore, Mr. Clagett says that what he did was under

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as stated in the allegation, and which may, if it did take place, notwithstanding the disorder under which the deceased laboured, be sufficient to establish the codicil. But did the conversation take place? There is nothing but the allegation of Mr. Dufaur himself; for it is not in evidence. Barton does not speak to having seen or heard Mr. Dufaur in conversation with the deceased, or mention anything to support the representation given by Mr. Dufaur in his allegation as to what took place on that occasion. If it did take place, the witness Barton, who was almost constantly in attendance with the deceased, and if she left the room was only in an adjoining room—if, I say, there had been any communication with the deceased in a loud tone of voice, she must have heard it; but she says nothing at all as to anything passing between Mr. Dufaur and the deceased between the night of the 21st and the morning of the 22nd. There is nothing whatever to support the account given in the allegation of what is said to have passed between Mr. Dufaur and the deceased. The transaction is not impossible; it would not be an irrational transaction; but the Court must be satisfied (considering the state of mind of the deceased prior to the execution of the codicil)—that it was his own act, and done with caution and deliberation, and with a full knowledge of the effect it would have on the disposition of his property. We have nothing but a draft prepared by Mr. Dufaur in his own handwriting in pencil, and delivered to Mr. Hewson for the purpose of being copied; and the knowledge of Mrs. Day, and Mr. and Mrs. Clagett, of the paper from which the codicil was to be prepared

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September, which was frequently alluded to by him, expressive of his satisfaction with that codicil, and considering that it was made in consequence of a previous intention declared by the deceased to make a further provision for his illegitimate child, and the care and attention of the deceased, the preparation and execution of the instrument carrying the bulk of his intentions into effect (I mean the will and codicil of May 1834), I can say that the manner of his giving to Mr. Dimes as he is said to have done, instructions for the codicil is a circumstance which argues a clear mind, or calm consideration and deliberation on the part of the deceased. There could have been nothing improper in the deceased's avowing that he had done, though no previous intention had been expressed of making this important alteration in his will.

There had been no diminution of confidence in the executors, for, the persons whom on the 10th of September, he consulted or wished to consult in relation to the testamentary act of that date, were Simpson and his son Mr. John Simpson. Pinder Simpson saw him first on the 10th of September, and Mr. John Simpson afterwards, and, as far as the Court is able to trace, there was no diminution of confidence on the part of the deceased towards any of the gentlemen who had been selected by himself for the purpose of carrying his intentions into execution. What had been the conduct of the deceased when he appointed an additional executor in his will of 1834? He consulted with Mr. Simpson as to the addition of a third person, and as to whether the person was

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or any one else, in the attestation clause, in consequence of the deceased having signed his name instead of making his mark ;” (but the witness Barton says there was) “ nothing whatever was said by the deceased as to declaring the paper to be a codicil to his will, or publishing it as such, neither did he go through any form of sealing, nor did he request any persons to attest the execution thereof. I remember that I, Mr. Clagett, and Fanny, Mrs. Day’s maid, did sign our names as witnesses ; but when the latter came into the room, or during what part of the transaction she was there, I cannot recollect. I remember that Mr. Dufaur asked us three to sign our names as witnesses, and that we did so in the presence of the deceased, in testimony of our having been present at the due execution of the codicil by the deceased.” This is the account given by this gentleman as to the execution of the instrument ; that he told the deceased that he had prepared a codicil at the request of Mr. Dufaur, and asked him whether he should read it ; that the deceased nodded by way of assent ; that he read it over clearly and distinctly ; and the deceased, when asked whether it was his wish, said, “ Yes,” firmly and distinctly ; and, according to the account of Mr. Hewson, when he was told that he might make his mark, the deceased said, in an irritable manner, “ Why should I not sign my name ?” But here is not a single expression from the deceased as to recognizing the contents of the codicil. No doubt, if the instrument had been read over to any one of unimpeached capacity, it would be sufficient to supply the want of instructions. But the question is, whether, in the state of the deceased,

29th September, expressed an opinion as to the validity of the codicil, he did not require that the deceased should be asked with respect to it; and also extraordinary that some inquiries should not have been addressed to the deceased by those about with respect to the transaction, whether he executed the codicil or not. But so it is; nevertheless Mr. Dufaur, who was appointed an executor, any part of the family, asked the deceased anything with respect to this codicil, and the deceased on his part was silent. There is nothing whatever to confirm the instructions given by the deceased according to the allegation of Mr. Dufaur, or that on the very morning the codicil was prepared for execution. No person heard the conversation between the deceased and Mr. Dufaur. The instructions were taken in the handwriting of Mr. Dufaur, and Mr. Dufaur, not thinking it right that the codicil should be in his writing, gave the instructions to Mr. Hewson to copy; but Mr. Dufaur, as a solicitor, should have been more careful, and should have placed himself in a condition to prove circumstances with respect to the deceased's mind and capacity.

I must not be understood to convey any opinion as to Mr. Dufaur's having committed anything like a fraud. I have no right to say that he has been guilty of anything of the kind. It is very possible that everything pleaded by Mr. Dufaur may be true; and if he had proved it by evidence, it might have been sufficient to satisfy the Court that the codicil was the act of the deceased, notwithstanding there was no previous declaration and no subsequent recognition. But there is no evidence to satisfy the Court that this was the intention of the deceased; I

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not the benefit of any fact before me. 'I do not mean to say that the deceased himself was not capable of originating such a codicil, or capable of expressing himself in the manner stated in the allegation of Mr. Dufaur; but I have no evidence to show that he did; the only evidence before the Court with respect to the execution is, that it was read over without one syllable being said by the deceased with reference to the contents of the instrument read; and seeing the fluctuating state of the deceased's capacity during the very time it was read—for immediately afterwards he relapsed into a state of incoherency and inconsistency,—I say I am not satisfied in my own mind (and that is the whole extent to which the Court goes) that the deceased did intend that this codicil should be carried into effect in connection with the instrument he had previously made, and (as far as the Court can find) adhered to up to the period of the execution of this codicil, that is, that the three gentlemen named in the will should manage the whole of his affairs after his death.

I do not say anything as to the manner in which the opposition to this codicil has been conducted. I think it was the bounden duty of the executors to take the opinion of the Court as to the validity of this paper; and it is but justice to say, with regard to Mr. John Simpson and Mr. Pinder Simpson, that I see no reason why they should feel greater animosity to Mr. Dufaur than Mr. Underwood and Mr. Croft. I see no reason why Messrs. Underwood and Croft should not be as much against this codicil as Mr. Pinder Simpson and Mr. John Simpson. I think it was the bounden

duty of the executors to take the opinion of the Court as to this paper, and if they were of opinion that the codicil could not stand under the circumstances in which it was made, they were justified in opposing the paper, not as improperly or fraudulently obtained, though if they believed that Mr. Dufaur had not conducted himself with perfect propriety towards the deceased, and on that ground declined to act with him, I see no reason why they should not oppose the codicil, and conduct themselves as they have done. But when it is suggested that Mrs. Day has no interest to oppose Mr. Dufaur, and that no person has an interest but Mr. John Simpson, or "cares a pinch of snuff" whether the codicil is established or not, I must say that the executors were perfectly justified in opposing the codicil, there being as much doubt whether it was the intention of Mr. Day to add to the number of his executors as to add Mr. Dufaur, considering the probabilities of the case, the great caution of the deceased when he added Mr. Croft to the number, to ask whether the person he appointed would dovetail with Mr. Simpson or not, showing how anxious he was as to the best mode of carrying his intentions into effect.

Under all the circumstances of the case, I am of opinion, not that there has been fraud here, but that there is a defect and failure of proof; that I cannot come to the conclusion on this evidence that there is sufficient to satisfy the requisites of the law. Mr. Dufaur was himself present at the execution of the codicil. If Mr. Dufaur had suggested, as he ought to have done, that under the circumstances of his being the person benefited by

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the codicil, and the instructions being in his handwriting, that he should withdraw from the room, and questions should be addressed to the testator as to whether he knew the contents of the instrument, and whether it was in accordance with his wishes and intentions, as it was supposed to be, the case would have worn a different aspect; but no questions are suggested—all passes in dumb show, as far as the deceased is concerned, with the exception only of what he said about signing his name, and another exception of his asking for the desk.

On the whole case, I am of opinion that there is a failure of proof, and I pronounce against the validity of the codicil, and decree probate of the will and four other codicils to the executors.

DE BONNEVAL *against* DE BONNEVAL.

On Petition.

GUY HENRY DU VAL, Marquis de Bonneval, the deceased in this case, died in Norton-street, Fitzroy-square, on the 22nd September 1836, a bachelor, without a parent, leaving the Comte de Bonneval, his brother by the whole blood, and the Marquis de la Jonquiere, his brother by the half blood, his only next of kin.

He left a will in the English language, executed

PREROGATIVE COURT OF CANTERBURY.

in England on the 19th of December, 1814, which the First Lord of the Treasury for the time being, his nephew, Guy Charles Oscar du Comte de Bonneval, Robert Herries and Ottobach Robinson, Esquires, were appointed trustees and executors.

He also executed a further will in France on the 1st of February, 1826, disposing of his property in France only, and confirming his will made in England.

Probate of the English will was prayed on behalf of the Vicomte de Bonneval, one of the executors; this was opposed on the part of the Comte de Bonneval, the brother of the deceased, who prayed to be heard on his petition in objection thereto. An act on petition was afterwards brought in, and the only question now before the Court was, whether the Marquis de Bonneval, the party deceased, was domiciled at his death in England or in France.

Lushington and Haygard for the French donee.

Addams and Curteis contra.

JUDGMENT.

SIR HERBERT JENNER.

This question comes before the Court in the shape of an act on petition, respecting a will of the Marquis de Bonneval, dated in 1814, the deceased having died in 1836. He was a bachelor, and left a brother by the whole blood, and a brother

A Frenchman having quitted France in 1792, in consequence of the Revolution, and having resided in England until 1814, when he returned to France, and occasionally in both countries, held, not to have abandoned his original domicile. ^{abandoned}

The validity of a will is to be determined by the law of the country where the testator was domiciled at his death.

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the half blood, who would be entitled in distribution to his personal estate both by the laws of France and England, if he died intestate.

The parties before the Court are Charles François Guy du Val, Comte de Bonneval, the brother by the whole blood, and Guy Charles Oscar du Val, Vicomte de Bonneval, nephew of the deceased, who would be entitled to a benefit under the will, if good and valid. The simple question is, whether the deceased was domiciled in France or in this country? On that point it will depend by the laws of which country the validity or invalidity of the will is to be tried: for it is now settled by the case of *Stanley v. Bernes*, (a) that the law of the place of domicil, and not the *lex loci rei sitæ*, governs the distribution of and succession to personal property, in testacy or intestacy. In that case, the question related to the validity of certain codicils, disposing of property in this country, and it was decided by the High Court of Delegates, that if the instrument be not executed according to the law of the domicil of the testator, it is invalid. As far as I am aware of the point decided in that case, it was held that the law of the domicil applies to questions of testacy as well as of intestacy. It appears that my learned predecessor expressly stated the question in that case to be, whether a British subject, who died abroad (Mr. Stanley, the testator, having died abroad, after acquiring a domicil in Portugal,) disposing of his property in this country by will, must make it according to British law or foreign law; and he went on to say, that if, in a case of testacy, the *lex domicilii* applied, and not the law of the country where the property was situated, it would

(a) 3 Hagg. 273.

operate to defeat the intention of the testator he observed : (a) "What is the Court called by the opposer of the codicil to decide? That invalid, contrary to the manifest intention of the testator ; that intention being expressed in a instrument duly executed, according, and with obedience to the law of this country, in his own handwriting, and attested by three witnesses." The Court of Delegates having reversed the sentence of the Prerogative Court, it follows (though no reason given by the Court for its decision) that the codicils were pronounced against, on the ground that they were not executed according to the law of Portugal, where the testator was domiciled, that, consequently, this Court must hold that wills, disposing of personal property, situated in this country, must be executed according to the law of the country where the party executing instrument was domiciled.

The facts of the case, as set forth in the petition, and affidavits on both sides, are that the deceased, Guy Henri du Val, Marquis de Bonneval, died at the age of 71, on the 22nd September 1836, in Norton-street, Fitzroy-square, London, that the will in question is made in the English form, and was executed for the purpose of disposing of the property in England alone, being confined simply to that ; that he also made a will, in 1828, at Paris, by which he disposed of his property in France, and that he thereby institutes the Vicomte de Bonneval, his nephew (son of the party before the Court, the Comte de Bonneval) sole and uni-

(a) p. 443.

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sal heir; that the deceased was born in France, in 1765, of French parents, and continued to reside there till 1792, when he left that country in consequence of the Revolution; that his parents were of high rank, and he succeeded to estates in France, and was President à Mortier in the Parliament of Normandy; that on his leaving France, in 1792, he proceeded first to Germany, and afterwards to England, and continued to reside here till 1814 or 1815, during which time he received an allowance from the government of this country, as a French emigrant; that on the return of the Bourbons, he repaired to France, and it is stated on behalf of his brother (who asserts the French domicile,) that the deceased went to France in 1814, and that, on the escape of Bonaparte from Elba, he came again to this country, but returned to France in 1815; that from 1815, (according to the statement of the brother,) he continued to reside in France, occasionally visiting this country, till 1821, when he became entitled to certain property under the will of his aunt, including the chateau and estate of Soquence, in the district of Rouen, and in 1823, he succeeded to part of the estate of his mother; that from 1814 to 1827, he was actively engaged in the settlement of his property and family affairs in France; that he agreed to purchase of his brother part of his paternal property, which had been confiscated under a decree of the French government, and to part of which property he was entitled. It is further stated, that in the deed of purchase of these estates in 1827, made at Paris, the deceased is described as "residing usually at the chateau of Soquence," and that in a decree of the Court of

Appeal, at Caen, he is described as "living on his rents and domiciliated in the Commune of Sahurs, district of Rouen." The act on petition goes on to state, that in 1825, the deceased received compensation as a French emigrant for the property confiscated at the Revolution, and that from 1815 to 1821, he resided on his property in France, and took up his domicil in the chateau of Soquence, and maintained it till his death; that from 1815 to 1821, he made occasional visits to England, and in 1821, he took a house in Norton-street, in which he resided when he came to England, but that such visits (which is not denied by the other side) were interrupted for several years together; that, in 1834, he came to England, but with the intention of returning again to France; that he was rated as proprietor of the property at Soquence, to the electoral contributions of the district; that he exercised his political rights as a French subject, and constantly described himself, and was described in legal proceedings, as domiciled in France, and there are entries in the Register of Mortgages at Rouen, from 1827 to 1836, in which he is so described; that the deceased was a Marquis of France, and by the will of 1826, disposing of his property in France, he directs his nephew, out of certain estates in France, to form a *majorat*, to serve as an endowment to the title of hereditary marquis, granted to their ancestors about 1680, and to settle the same upon the heirs male of their name, by order of primogeniture and proximity to the elder branch.

These are the grounds upon which the brother contends that the deceased was domiciled in France,

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and consequently that the validity of the will must be determined by the law of that country.

On the other side, it is alleged, that the deceased came to this country in 1793, and that, with certain exceptions, he ever after resided here, down to the time of his death; that in June 1814, the deceased took the lease of a house in Mortimer-street, Cavendish-square, for the term of eight years, and in 1820, he took the lease of another house in Norton-street for forty-four years, for which he paid 360*l.* premium and a rent of 40*l.* per annum, putting himself to considerable expense in fitting up and furnishing the house, which he continued to occupy till his death, keeping up an establishment of servants there, and spoke of the house as his "home." The act denies that, on his return to France, he was generally or principally resident there from 1814 to 1821, and alleges, that in 1821, he had no house in France, but went there merely to visit his friends and relations, and to obtain compensation for his losses; that, after he became entitled to the chateau and estate of Soquence in 1821, he was involved in law suits in France, which he was compelled frequently to visit, passing considerable portions of time there, and in order to give validity to acts done there, he was obliged to describe himself as of a certain residence or domicile in that kingdom, but from 1834 to the time of his death he continued permanently to reside in this country, without paying a single visit to France, though not prevented from doing so by ill health, or by any other circumstance than his uniformly avowed preference for a residence in this country, and that in 1834, the name of the deceased was included in

the list of persons entitled to vote at the election of members of Parliament for the Borough, and that he at all times kept his property in England wholly distinct from his property in France.

These are the principal grounds on which it is contended that the party died domiciled in this country.

In the reply, it is alleged, that the deceased kept up an establishment at Soquence, and that, at his death, a correspondence consisting of about 1200 letters, dated from 1818 to 1835, and from different persons and places, was found at his chateau at Soquence, carefully preserved and classed, and that the family papers and plate of the deceased were deposited there. That the house in London was kept for his convenience when here, and in case of new disturbances in France, of which he expressed fears, and that he exercised in France the political rights of a French subject.

Before I proceed to consider the effect of the facts stated in the affidavits, admissions and documents, I will refer briefly to what I consider the principles on which this question ought to be decided, with reference to the state of the facts. I apprehend that it being *prima facie* evidence only, that where a person resides, there he is domiciled, it is necessary to see what was the domicil of origin of the party. Having first ascertained the domicil of origin, that domicil prevails till the party shall have acquired another, with an intention of abandoning the original domicil. That has been the rule since the case of *Somerville v. Somerville*. (a) Another principle is, that the acquisition of a domicil does not simply depend upon the residence

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(a) 5 Ves. Jun. 750.

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of the party ; the fact of residence must be accompanied by an intention of permanently residing in the new domicil, and of abandoning the former ; in other words, the change of domicil must be manifested, *animo et facto*, by the fact of residence and the intention to abandon. A third principle is, that the domicil of origin having been abandoned, and a new domicil acquired, the new domicil may be abandoned and a third domicil acquired. Again, the presumption of law being that the domicil of origin subsists until a change of domicil is proved, the *onus* of proving the change is on the party alleging it, and this *onus* is not discharged by merely proving residence in another place, which is not inconsistent with an intention to return to the original domicil ; for the change must be demonstrated by fact and intention.

Applying these principles to the case now to be decided, there is no doubt that the domicil of origin of the deceased was France, for there he was born and continued to reside from 1765 to 1792, and he left that country only in consequence of the disturbances which broke out there. He came here in 1793, but he came in the character of a Frenchman, and retained that character till he left this country in 1814, for he received an allowance from our government as a French emigrant. Coming with no intention of permanently residing here, did anything occur, whilst he was resident here, to indicate a contrary intention ? It is clear to me, that as in the case of exile, the absence of a person from his own country will not operate as a change of domicil ; so, where a party removes to another country to avoid the inconveniences attending a residence in his own, he does not intend to abandon

his original domicil, or to acquire a new one in the country to which he comes to avoid such inconveniences. At all events it must be considered a compulsory residence in this country; he was forced to leave his own and was prevented from returning till 1814. Had his residence here been, in the first instance, voluntary; had he come here to take up a permanent abode in this country, and to abandon his domicil of origin, that is, to disunite himself from his native country, the result might have been different. It is true that he made a long and continued residence in this country, but I am of opinion that a continued residence in this country is not sufficient to produce a change of domicil; for he came here avowedly as an emigrant, with an intention of returning to his own country so soon as the causes ceased to operate which had driven him from his native home. He remained a Frenchman, and if he had died during the interval between 1793 and 1815, his property would have been administered according to the law of France.

Up to 1814, then, he had not acquired a domicil in this country; the connexion with his native country was not abandoned; from whence then is the Court to collect that he had at any time acquired a domicil in this country, by any act manifesting an intention to do so? I can find no fact beyond the mere residence in this country till 1814, and his taking the lease of a house for eight years, which would be a strong fact to show intention, if it had been followed up by a continued residence here. But what is the fact? In 1814 the Bourbons were restored, and as he returned to his own country after taking this house,

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the inference is, that he did not intend to reside here, but took the house with a view of securing a residence of his own if he should be forced to return hither; and it turned out that his apprehensions were not ill-founded. He remains in France during the greater part of the interval, between that time and 1821. It is alleged that he was employed during these visits in settling his family affairs, and it has been argued that his return to France was not in order to resume his French domicil, an argument which might have some force if he had lost his French domicil. But the question is, had he abandoned his French domicil? I am of opinion that he had not abandoned his French domicil, nor acquired one in England, up to 1814 or 1815.

I have looked through the affidavits to find what time the deceased resided in this country after 1815, but there is no evidence as to the period he resided here between 1815 and 1821. Maria Bureau, his servant at the house in Norton-street, knew nothing of him till 1824, and his agent in France, M. Gamare, was not acquainted with him till 1826; M. Gamare, whose affidavit is produced by the party who contends for an English domicil, states that he "considered at all times that the general residence of the deceased was in England;" that the deponent was in the constant habit of corresponding with him by letter, when he was there; that "upon many occasions, when the deceased was in England, and his presence was necessary in France, the deponent experienced great difficulty in inducing the deceased to quit his residence in England, and to come to that country, to attend his interests

there." That must have been after 1826, "that from the end of September 1834, until his decease, the deceased did not quit his residence in England, although he was not prevented from so doing, as he sincerely believes, by his health or by any other circumstance than his constantly avowed preference for his residence in England;" and he goes on to state that the deceased kept his property in England entirely distinct and apart from that in France.

The evidence with respect to the periods of time, during which the deceased resided in the two countries respectively, is extremely loose. It is difficult to collect, from the affidavit of Gamare, what were the periods of the deceased's residence in France, and he says nothing of his residence there for three years and a half from 1828, spoken to by Bureau. It appears, from her affidavit, as well as from documents in the cause, that he left England in 1828 and resided entirely in France for three years and a half; that subsequently, he was again absent from England for eight months (which is not spoken to by Gamare,) and in the contract of sale in March 1827, when he purchased some property of his half-brother, he is described as "residing usually at the chateau de Soquence, near Rouen." It would appear that he was engaged in law proceedings in France till 1831; that he was there in 1833 and 1834, and that between 1830 and 1834, he was seen frequently to proceed by the steam-boat up the river to Rouen.

Now, under these circumstances, it appears to me that there is no evidence to show that the deceased ever acquired a domicil in this country. I see nothing but the fact of the taking of the lease of

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a house in Norton-street in 1820, for a long term undoubtedly, but which does not appear to denote anything more than an intention of providing a place of occasional residence in this country. But up to 1820 he had acquired no domicile here, and during the subsequent time, he was absent in France for several years; there is nothing, therefore, to shew that he had abandoned his original domicile and had taken up his *sole* domicile (for that is the expression used in *Somerville v. Somerville*) in this country, although he kept two female servants in this country, yet when I find that he kept an establishment at Soquence; that he had plate and furniture there worth 1200*l.*; that his family papers and his correspondence were deposited there, the letters classed and arranged,—his having a house here can have been only for an occasional residence in England, even if he divided his residence between the two countries, or even if he spent the greater part of his time here; but all the evidence as to his continued residence in this country is, that he resided here from 1834 to 1836, though it does not appear that he did not intend to return to France. I do not consider that, in this case, any more than in *Somerville v. Somerville*, the declarations made by the deceased at different times that he preferred a residence in this country can be a ground upon which the Court is to rest its judgment; the domicile cannot depend upon loose declarations of this sort, where there are documents which shew that the party looked to France as his home. Unless the evidence was nicely balanced, the Court would pay no regard to such declarations, showing a preference for a residence in this country.

and not a decided intention to abandon his native land, and take up his sole residence here.

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I am not inclined to pay much more attention to the descriptions of the deceased in the legal proceedings in France; for it may have been necessary, as the proceedings related to real property, that he should describe himself as of some place in that kingdom. I am inclined also to pay very little attention to the statements as to his exercise of political rights in France, or to his being registered as a voter here: being a house-keeper, he was registered here as a matter of course.

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It is stated that he resisted with success the contribution to some of the French rates, which a person resident in France was liable to; but the grounds are not stated, and it is too loose a reasoning, that because all French subjects are liable to such rates, and he successfully resisted them, therefore, he was not domiciled in France. It must be shewn that the question came regularly before the French tribunals, and he was held to be not a domiciled subject of France.

I am, therefore, of opinion that the deceased continued a domiciled French subject to the time of his death, and consequently that the validity or invalidity of his will must be determined by the French tribunals, and not by this Court. The precise form, in which the Court must pronounce its sentence, is this: that the deceased, at the time of his death, was a domiciled subject of France, and that the Courts of that country are the competent authority to determine the validity of his will and the succession to his personal estate; and

1838. as in the case of *Hare v. Nasmyth (a)*, the Court
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 the will, till it is pronounced valid or invalid by the
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CONSISTORY COURT OF LONDON.

DORMER falsely called WILLIAMS against WILLIAMS.

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The marriage of parties under a license from "a person not having authority to grant the same," is not void by 4 G. 4, c. 76, s. 22, unless both parties knowingly and wilfully intermarry by virtue of such license.

This was a question as to the admissibility of the libel in a suit of nullity of marriage, brought by Mrs. Williams, proceeding as Maria Teresa Dormer, of the parish of St. George, Hanover Square, against Mr. William Henry Williams of the same parish.

The libel pleaded,

1st. That by the statute 4 Geo. 4, c. 76. It is, among other things, enacted, "that if any persons shall knowingly and wilfully intermarry in any other place than a church, or such public chapel wherein banns may be lawfully published, unless by special license as aforesaid, or shall knowingly and wilfully intermarry without due publication of banns, or license from a person or persons having authority to grant the same, first had and obtained, or shall knowingly and wilfully consent to, or acquiesce in the solemnization of such marriage, by

(a) 2 Add. 25.

any person not being in holy orders, the marriage of such person shall be null and void to all intents and purposes whatsoever," &c.

2nd. That the said William Henry Williams, being a bachelor, of the age of twenty-one years, paid his addresses to the said Maria Teresa Dormer, a spinster, of the age of nineteen years and upwards, that they agreed to be married, that the father of Mr. Williams, as also the aunt and other relatives of Miss Dormer, with whom she was then residing at Swinnerton, in the county of Stafford, severally were averse to the said intended marriage, but that the parties, nevertheless, determined to effect the

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3rd. That it being agreed between the said parties, (in order to effect their said marriage clandestinely,) to be married by license at the parish church of Swinnerton, Mr. Williams undertook to procure a license for the celebration of the said marriage at the said parish church, but that, instead of obtaining such license from any person or persons having authority to grant the same, he procured a pretended license, as for the celebration of the said marriage in the parish church of Swinnerton, from a person having no authority to grant such a license, such pretended license being granted as by the authority and under the seal of the Lord Bishop of St. Asaph, whereas the party alleged that the parish of Swinnerton is in the county of Stafford, and in the Diocese of the Lord Bishop of Lichfield and Coventry.

4th. That the said William Henry Williams, immediately after having obtained the said pretended license, finding that the same was null and inoperative,

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but fearful that, in the event of any delay occasioned by the procuring of a new license, or otherwise, the relatives of the said Maria Teresa Dormer might interfere and prevail on her to forego her determination to be married to him, persuaded and induced her to consent to the celebration of the said intended marriage at the parochial chapel of Halston, in the county of Salop, and diocese of St. Asaph (described as the parish of him, the said W. H. Williams, in the said pretended license) provided he could procure a clergyman who would perform the ceremony at the said parochial chapel under, and as in virtue of the said pretended license, &c.

5th. That W. H. Williams, accordingly, on the 22nd December 1836, proceeded to the village of Ellesmere, and there obtained the consent of the Rev. J. F., to celebrate a marriage between himself and the said M. T. Dormer, in the parochial chapel of Halston (in the absence, as previously ascertained of the regular officiating minister), as in virtue of the pretended license aforesaid, for the celebration of the said marriage in the parish church of Swinnerton.

6th. That the said M. T. Dormer, as had been pre-arranged between her and the said W. H. Williams, secretly left Swinnerton, where she was then residing with her aunt, early in the morning of the 23rd of December 1836, and proceeded in a carriage of the said W. H. Williams, accompanied only by a female servant to Ellesmere, and there joined the said W. H. Williams. That the said parties were on the said 23rd of December in fact, though unlawfully, married by the said Rev. J. F.

at the parochial chapel of Halston, as in virtue of the said pretended license.

Seventh. That the parties were so married after the 18th of July 1823, when the act received the royal assent, that they "knowingly and wilfully intermarried, to wit, in the parochial chapel of Halston aforesaid, without due or any publication of banns, and without a license for such marriage from any person or persons having authority to grant the same, first had and obtained," by reason whereof such their marriage was and is null and void.

Eighth. In supply of proof, annexed a copy of the affidavit made on obtaining the license.

Ninth. Pleaded a copy of the entry of the marriage in the Register of Marriages in the chapel of Halston.

Burnaby and Haggard opposed the admission of the libel, on the ground that the facts did not show that both parties had a guilty knowledge that the license was an illegal one; that although this was the first case of nullity of marriage under a *license*, still the clause of the act had been under consideration in the cases with respect to publication of banns, and the same rule must apply in both instances; further, that under the present libel, there can be no proof of the license itself, it is not exhibited.

The Queen's Advocate and Addams, in support of the libel. The 22nd section of the statute of 4 Geo. 4, c. 76, enacts, that if any persons shall knowingly and wilfully intermarry without due publication of banns or license from a person or persons having authority

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to grant the same first had and obtained, the marriage of such persons shall be null and void to all intents and purposes whatsoever. The libel states that this marriage was celebrated by virtue of a pretended license granted by a person not having authority to grant the same, and that the parties intermarried by virtue of such license, knowingly and wilfully. It is said that the license cannot be proved, because it is not in existence, but the affidavit is pleaded, which is always followed by the license.

They cited *Balfour v. Carpenter*. (a)

JUDGMENT.

Dr. LUSHINGTON.

It has been truly stated that this is the first occasion on which a question has arisen as to the construction of the act of parliament with respect to a marriage had in virtue of a license granted by a person without authority to grant the same, and I think it therefore, in the first place, incumbent upon me to apply my attention to the clause in the act, in order to ascertain its true construction generally, and to see whether the facts stated in the libel bring the case within that construction.

The question has arisen on former occasions with respect to the due publication of banns, and it has been settled by the superior tribunal, (b) that in order to render a marriage null and void, under the 22nd section of the act, both parties must have acted knowingly and wilfully ; for it is not sufficient that the parties intermarry without due publication

(a) 1 Phill. 204.

(b) See *Tongue v. Allen*, *ante*, p. 38, and 1 Moore's P. C. Cases, 90.

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of banns; they must have known that there was no due publication, and must have wilfully intended to disregard and defeat the law.

Now with respect to the words in the clause in question, "a license from a person or persons having authority to grant the same," the following considerations arise: whether they mean authority to grant a license at all, or authority to grant a particular license required on the occasion. I am willing, for the present purpose, to take it that they mean the particular license requisite on the occasion. Then in my judgment, the whole question turns upon this: whether the facts and circumstances are such as to prove that both parties knowingly and wilfully intermarried without a license from a person having authority to grant that license.

I must observe that I do not think that any light is thrown upon the question by the case of *Balfour v. Carpenter*, which occurred at a time when the former marriage act was in operation, because it is specially provided by that act (a) that marriages "solemnized without publication of banns, or license of marriage from a person or persons having authority to grant the same, shall be null and void, notwithstanding the intents and purposes whatsoever:" so that it was a specific enactment, compelling the Court to hold such marriages null and void. The present act is very different from Lord Hardwicke's Marriage Act. By that act it was intended to enforce with the utmost rigour the form and mode in which all marriages should be solemnized, by the se-

(a) 26 Geo. 2, c. 33, sect. 8.

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penalty of nullity if the very words of the statute were not complied with. By the present act, in order to render a marriage null and void, both the parties to the marriage must have wilfully violated the act with a full knowledge of the consequences; here is, therefore, a striking difference between the two statutes, and what may have been done with reference to the former marriage act can have little effect with regard to the construction of the present act.

By the construction put upon the present act, I take it that the facts pleaded in any libel for avoiding a marriage must be sufficient for either of the parties; that if Mr. Williams had been the party promoting the suit instead of Miss Dormer, (or Mrs. Williams,) he would have been entitled to a sentence declaring the marriage a nullity, as well as Mrs. Williams; and I am also to recollect, that the circumstances must be so stringent, as, if (instead of there being no issue, as happens to be the case here) there had been children, would compel me to bastardize the issue, and deprive them of any property to which they would be entitled if the marriage were not declared null and void. Taking this view of the case, I conceive the intention of the legislature to have been that the facts and circumstances under which the 22nd section of the statute shall have operation must be perfectly conclusive; by which I mean, that the plea should be such, that, if all the facts and circumstances stated therein were satisfactorily proved, I should be compelled to hold that both parties to the marriage had a guilty knowledge of the violation of the law; and the task I have now to perform is to examine the allegations

set forth in the libel, and see whether the case comes within the construction of the act, according to my view of it.

The libel begins by pleading the act of parliament, the courtship, and that the parties agreed to be married, but that the relations were averse. What I am now looking for is, whether, supposing fraud to have been contemplated, Miss Dormer, the party proceeding in the cause, knew that she was about to be married in virtue of a license granted by a person who had no authority to grant it. The third article alleges, "that it being agreed between the parties, in order to effect the marriage clandestinely, to be married by license at the parish church of Swinnerton." I assume (though it ought to have been pleaded more in detail) that the parties determined to effect a clandestine marriage, and so far as the presumption goes, of an intention to proceed clandestinely, I give the party the full benefit of it; but according to the plea itself, there was no intention to violate the law, for it is pleaded that they intended to be married in the parish of Swinnerton, where the lady resided, and by a license—"Mr. Williams undertook to procure a license for the purpose; but instead of obtaining it from any person having authority to grant the same, procured a license as for the celebration of the marriage in the parish church of Swinnerton, under the seal of the bishop of St. Asaph, Swinnerton being in the county of Salop and diocese of Lichfield and Coventry."

Now, in the first place, looking at the case as regards Mr. Williams himself. Am I to suppose

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that Mr. Williams, being cognizant of the marriage law, went to the diocese of St. Asaph, for the purpose of procuring a license from a person who had no right to grant a license at all? But in order to give the party the fullest possible benefit, I will presume that he had such fraudulent intention to procure a mock license; the surrogate, who granted it, must have been ignorant or grossly negligent of the duty he had to perform. But I will take it that the surrogate did grant such a license, not being aware that he was violating the law. Mr. Williams then, having obtained a license wholly insufficient to celebrate the marriage, from a person not having authority to grant it, as pleaded in the fourth article, "persuaded and induced Miss Dormer to consent to the celebration of the intended marriage at the parochial chapel of Halston, in the county of Salop, and diocese of St. Asaph, provided he could procure a clergyman who would perform the ceremony at that chapel, by virtue of the said license." What am I to infer from this? He persuaded her to consent to be married in the parochial chapel of Halston; but it is not stated that she was told that the license was an illegal license, or that she was aware of the illegality of the license. If I were to stop here, how can this be a violation of the law, which requires that both parties shall knowingly and wilfully intermarry without license from a person having authority to grant the same? And could I say that such a state of facts would justify me in bastardizing issue, and depriving them of some title of honour, the act itself requiring that there must have been a wilful

violation of the law, with a full knowledge of the consequences, before so extreme a penalty can be inflicted?

The fifth article pleads nothing but the fact of the marriage, and here again I observe, that if there has been any illegality, through a wilful disregard of the law, on the part of Mr. and Mrs. Williams, here is a clergyman of the church of England, who ought to have read, and who must have read the license, who, in neglect of his duty, or in ignorance of the law, celebrated this marriage in virtue of a license which, on the face of it, was no authority at all.

In *Tongue v. Tongue*, the Judicial Committee were agreed that there must be evidence to establish a disregard of the law knowingly and wilfully by both parties. The facts stated in this libel do not afford any reason to conclude that the party proceeding in the cause had a guilty knowledge that the law was violated; without evidence of which the marriage cannot be declared null and void. And I must not lose sight of this, that although in this case the lady avails herself of the law for her protection, that law, if not administered with caution, might, under similar circumstances, have been wrested against her and against the innocent offspring of the marriage.

I think it my duty not to admit the libel.

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ARCHES COURT OF CANTERBURY.

The Office of the Judge promoted by BREEKS against WOOLFREY.

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Prayers for the dead are not prohibited by the Church of England.

In a criminal proceeding, it is not competent to the promoter to set forth in the articles an offence not contained in the citation. The articles must agree with the citation.

This was a question as to the admissibility of the articles in a cause of office promoted by the Rev. John Breeks, the vicar of the parish of Carisbrooke, in the Isle of Wight, against Mary Woolfrey, widow, for "having unduly and unlawfully erected or caused to be erected a certain tombstone in the churchyard of the said parish of Carisbrooke, to the memory of Joseph Woolfrey, late of the said parish, deceased, and a certain inscription to be made thereon contrary to the articles, canons and constitutions, or to the doctrine and discipline of the Church of England." (The above were the words of the decree or citation.) The proceeding was by letters of request from the chancellor of the diocese of Winchester.

The articles were in substance as follows:—

First.—We article and object to you, the said Mary Woolfrey, widow, that by the laws, customs and usages of this realm, it is forbidden to erect, or cause to be erected in the churchyard of any parish or place any tomb or head-stone or other monument, without the consent of the rector or vicar of such parish or place first had and obtained, or without a

faculty for the purpose first granted under the seal of the proper Court; and further, that it is by the twenty-second article of the Church of England, agreed upon by the archbishops and bishops of both provinces, and the whole clergy in the convocation holden at London, in the year 1562, declared that the Romish doctrine concerning purgatory, pardons, and other things therein mentioned is a fond thing, vainly invented and grounded upon no warranty of Scripture, but rather repugnant to the word of God. And we further article and object to you, that by reason of the premises, all persons erecting or causing to be erected in the churchyard of any parish any tomb or head-stone or other monument without the consent of the rector or vicar of such parish first had and obtained, or without a faculty for the purpose first granted under the seal of the proper Court, ought to be peremptorily monished immediately to remove the same; and further, that if such tomb or head-stone contain any inscription contrary to the doctrine and discipline of the Church of England, and to the articles of the said church hereinbefore recited, the person or persons erecting, or causing to be erected the same, or the person or persons making such inscription thereon, ought not only to be peremptorily monished immediately to remove the same, but also to be duly corrected and punished according to law for their excess and temerity therein, &c.

Second.—Also, that notwithstanding the premises, you, the said Mary Woolfrey, widow, did on or about the 8th day of February now last past, erect or cause to be erected in the churchyard of the said parish of Carisbrooke, a certain tomb or head-

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stone to the memory of your husband Joseph Woolfrey, deceased, without the consent of the said Rev. John Brecks, clerk, who was then and still is the vicar of the said parish, first had and obtained, and without any faculty for the purpose under the seal of any Court whatever, and that upon such tomb or head-stone, there are contained among others, the following inscriptions, namely, "Pray for the soul of J. Woolfrey,"—and "It is a holy and wholesome thought to pray for the dead," both which said inscriptions we do further article and object to you to be contrary to the doctrine and discipline of the Church of England, and to the articles, canons and constitutions thereof, and particularly to the said twenty-second article hereinbefore recited, &c.

Third.—The third exhibited a copy of the writing and figures upon the stone—they were, "*Spes mea Christus,*"—"Pray for the soul of J. Woolfrey."—"It is a holy and wholesome thought to pray for the dead." 2 Mac. xii. 46. "J. W. obiit 5. die Jani. 1838, æt. 50."

Addams opposed the admission of the articles. The grounds on which the party is proceeded against in the articles are two. First, the erection of a tombstone without leave of the vicar of the parish; and secondly, placing thereon an inscription contrary to the articles, canons, and constitutions, or to the doctrine and discipline of the Church of England.

SIR H. JENNER.

Is it stated in the citation that it was done without leave of the incumbent?

Addams. No.

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They are separate and distinct offences, but there is no mention in the citation of the leave of the incumbent; the articles ought to agree with the citation.

Addams. I am not disposed to take the objection.

SIR H. JENNER.

But must not the Court take the objection, this being a criminal suit? If it was intended to proceed on the ground that the erection was without leave of the incumbent, it should have been stated in the citation.

Addams. The offence of erecting a tombstone is laid as a separate offence, and a certain position of law is laid down as applicable to that state of things, and the articles then go on to plead as an aggravation of the offence, the inscription. If they are separate offences, then the proceeding ought to have been in a different form; if they are not to be separated, then all that part of the articles charging the inscription to be contrary to the articles and doctrines of the Church of England ought to be expunged, and the offence ought to be confined to the erection of the tombstone without leave of the incumbent. In that case the party ought not to have been proceeded against in this Court by articles, but a proceeding in the civil form should have been adopted, namely, a monition taken out in the Diocesan Court; the first article sets forth that

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persons erecting such monuments without leave of the incumbent ought to be "peremptorily monished immediately to remove the same;" that is, by a civil proceeding. But the article goes on to lay down, which I admit to be law, that if any such stone contained an inscription contrary to the doctrine and discipline of the Church of England, the person causing it to be erected ought to be monished to remove it, and also to be duly corrected and punished. I admit that if parties erected such stone with an insulting design, they should be punished for their proceedings.

The second article then sets forth the inscriptions, and alleges them to be "contrary to the doctrine and discipline of the Church of England, and to the articles, canons, and constitutions thereof, and particularly the twenty-second article." He then denied that any offence had been committed, and argued that prayers for the dead were not necessarily connected with the Romish doctrine of purgatory; that many eminent divines of the reformed church were favourable to the practice of praying for the dead, and some had had similar inscriptions placed upon their tombs. The argument on this point is not inserted, as the judgment of the Court proceeded upon the same grounds.

The Queen's Advocate and *Curteis* in support of the articles, contended that the form of proceeding, namely, by articles, was the usual and the proper mode. *Bardin v. Calcott* (a), *Seager v. Bowle* (b), *Hopper v. Davis* (c).

(a) 1 Cons. Rep. 14.

(b) 1 Add. 541.

(c) Cases before Sir Geo. Lee, 1, 640.

That it was competent to the promoter to set forth in the articles the offence of erecting the stone without leave of the incumbent, that although those words were not contained in the citation, yet the citation in the *præsertim* calls upon the party to answer to *articles*, &c.—“for having unduly and illegally *erected*,” such stone—the citation, therefore, gave the party notice of the charge, and it was time enough to allege the offence more specifically when the articles were brought in.

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With regard to the inscription—they contended, first, that the request to “Pray for the soul of the deceased,” must be taken to be with reference to the Romish doctrine of purgatory, which is condemned by the twenty-second Article. The inscription is, “Pray for the soul of J. Woolfrey. It is a holy and wholesome thought to pray for the dead.” (2 Macabees, xii. 46.) The book from which this quotation is taken, being one of the Apocryphal books, according to the doctrine of the Church of England, although not so by the Romish Church; and the reference being not to the authorized version (in which there are not so many verses), but to the Douay Bible: and the passage being that upon which the doctrine of purgatory is mainly founded, it is to be inferred that the invitation to pray for the soul of the deceased was connected with that doctrine.

But *secondly*, Admitting, as had been stated by Dr. Addams, that prayers for the dead were not necessarily connected with purgatory, and that such prayers had been in use long before the doctrine of purgatory had been broached, still the Church of England, although it does not in words condemn such prayers, yet practically, it discoun-

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tenances and discourages them. The thirty-fifth Article declares "The second book of Homilies, the several titles whereof we have joined under this Article, does contain a godly and wholesome doctrine, and necessary for these times," &c. And among the titles given is that "of prayer," the third part of which, after treating of purgatory, and quoting St. Chrysostom and St. Cyprian, concludes, "Let these and other such places be sufficient to take away the gross errors of purgatory out of our heads, neither let us dream any more that the souls of the dead are anything at all holpen by our prayers."

In the primer of Henry the 8th, and in the first prayer book of Edward 6th, prayers for the dead were admitted; but this book being revised in 1552, and exceptions made against it on account of these prayers, they were altogether expunged, as being inconsistent with the doctrine of the Reformed Church.

They cited—

Comber's *Companion to the Temple*,

Wheatley's *Rational Illustration of the Book of Common Prayer*,

Shepherd's *Critical and Practical Elucidation of the Book of Common Prayer*, &c.,

Nicholls on *The Book of Common Prayer*,

Palmer's *Origines Liturgicæ*,

L'Estrange's *Alliance of Divine Offices*, &c.,

Whitgift's *Defence of the Answer to the Admonition against the Reply of T. C. Cartwright*, Tr. 21, p. 729,

Hammond's *Examination of the New Divine and Ancient Liturgy Vindicated*,

Mede's Sermon on the Righteous shall be had in Everlasting Remembrance. Book I. s. 22.

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JUDGMENT.

SIR H. JENNER.

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This case was very fully and elaborately argued, and the Court thought it due to the arguments which were addressed to it, to take time to consider of its judgment, and to look into the authorities which were cited. It is a cause in which the office of the judge has been promoted by the Rev. John Brecks, vicar of the parish of Carisbrooke, in the Isle of Wight, against Mary Woolfrey, of that parish, widow, citing her to answer to certain articles "touching and concerning her soul's health, and for the lawful correction of her manners and excesses," which is the usual style and language of the proceedings of the Court—"and more especially for having erected, or caused to be erected, a certain tombstone in the churchyard of the same parish, to the memory of Joseph Woolfrey, late of the parish, deceased, with a certain inscription thereon, contrary to the articles, canons, and constitutions or to the doctrine and discipline of the Church of England.

The cause is brought by letters of request from the diocese of Winchester (this Court having no original jurisdiction) the chancellor of that diocese having referred the matter to this Court, as he had a right to do. The offence is one clearly of ecclesiastical cognizance, and it was not denied, nay it was admitted, that if the inscriptions were of the character attributed to them in the citation, no person had a right to erect a tombstone with such inscriptions

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impugning the doctrine and discipline of the Church of England, and that a person so offending is liable to be punished, and the tombstone to be removed. The question then is, whether the inscriptions have been properly described in the citation, the additional offence laid in the articles that the stone was erected without leave of the incumbent does not, in my opinion, arise on the face of the citation ; the question is, therefore, confined to the legality of the inscriptions. The inscriptions set forth in the Articles being " Pray for the soul of J. Woolfrey," and, " It is a holy and wholesome thought to pray for the dead." (2 Mac. xii. 46.)

This being a criminal proceeding, the burthen of proving the charge lies on the promoter ; and the clergyman of the parish is not an improper person to proceed in such a case, for to the incumbent belongs the superintendence of the church and churchyard, and it is his duty to take care that no inscription should be placed there which could be made the means of disseminating doctrines inconsistent with those of the established religion.

The Articles purport to state the law, and the facts to which the law is to be applied. The first Article, with reference to the inscriptions alleges, that by the twenty-second Article of the Church of England agreed upon in 1562, it is declared that " the Romish doctrine concerning purgatory, pardons, and other things therein mentioned, is a fond thing, vainly invented, and grounded upon no warranty of Scripture, but rather repugnant to the word of God." That all persons erecting, or causing to be erected, in the churchyard of any parish any tomb or headstone, containing any inscription contrary to

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the doctrine and discipline of the Church of England and to the Articles of the said church, the person so doing ought not only to be peremptorily monished immediately to remove the same, but also be duly corrected and punished; and this proposition has not been denied by the other side. The second Article sets forth the facts, that notwithstanding the premises, Mrs. Woolfrey did erect a tomb or headstone with the inscriptions before mentioned, which it alleges to be contrary to the doctrine and discipline of the Church of England, and to the articles, canons, and constitutions thereof, and particularly to the said twenty-second Article, that due notice has been given to her to remove the same, but that she refuses so to do.

The *third* Article annexes a copy of the inscriptions, and the Articles conclude with praying that she be peremptorily monished to remove the stone, and be canonically corrected and punished and condemned in the costs.

The law then principally relied on is the twenty-second Article, although there is a general reference to the other articles, canons and constitutions of the church, and it is competent to the promoter to refer to the other Articles, and reference was made in the argument to the thirty-fifth Article on the Homilies, the first book of which was published in the reign of Edward the 6th, and the second in that of Elizabeth, and particular reference was made to the seventh Homily on Prayer.

In the argument in support of the Articles it was argued that the twenty-second Article, in declaring that the Romish doctrine of purgatory is repugnant to the word of God, did, in effect declare, that the

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offering of prayers for the dead was also opposed to the word of God, as constituting part of the doctrine of purgatory; for that the two were so intimately blended together, that it was impossible to separate the one from the other, consequently, that an inscription, inviting passers-by to pray for the soul of the deceased, and containing the passage from the Maccabees, was an illegal inscription.

The point then, upon which the whole question turns is, whether praying for the dead is so necessarily connected with the doctrine of purgatory as to form a part of it? It is no doubt true that the doctrine of purgatory includes the practice of praying for the dead, but it does not necessarily follow that the converse of the proposition is true—that is, that prayers for the dead necessarily constitute a part of the doctrine of purgatory, as held by the Romish Church. If that point could be made out there would be an end of the case, and the Court would be bound to monish the party to remove the stone, and to punish her with ecclesiastical censure and with costs. This was the point to which the counsel directed their arguments, and many authorities were cited, to some of which the Court will presently advert.

The counsel very properly abstained from entering into the theological part of the question; and it would not be proper for the Court to take upon itself the duty of inquiring whether the doctrine of purgatory, as received by the Romish Church, is or is not supported by any warranty of Scripture. The law—that is, the twenty-second Article—has expressly stated that that doctrine is “grounded upon no warranty of Scripture, but is rather repugnant

to the word of God," and by this law I am bound to govern myself.

The question then shortly is this, Is praying for the dead involved in the doctrine of purgatory? Now, with a view to deciding that question, the first thing to determine is, what is the doctrine of purgatory as received in the Romish church? This may be best ascertained by a reference to the decrees of the General Councils and to authors who have written on the subject. As far as I have been able to learn, it does not appear that there was any declaration of the doctrine of purgatory by any general council until that of Florence, in 1438, which contained the first allusion to the doctrine. This was followed up by a decree of the Council of Trent, in 1563, which was a year after the articles of religion were set forth by royal authority in this country.

When I state that no mention was made of the doctrine of purgatory in any general council previous to that of Florence, I do not mean to say that the doctrine was not received at an earlier period; it would appear, according to the best authorities to which the Court had access, that the notion of purgatory was first introduced about the fifth or sixth century. Bishop Tomline, in the second volume of his *Elements of Christian Theology*, states, that "the practice of praying for the dead began in the third century, but it was not till long afterwards that purgatory was ever mentioned among Christians. It was at first doubtfully received, and was not fully established until the papacy of Gregory the Great, in the beginning of the seventh century." The doctrine then so in-

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troduced, and which is declared by the twenty-second Article of our Church to be repugnant to the word of God, is thus described in the catechism of Trent, "*Est purgatorius ignis, quo piorum anime ad definitum tempus cruciatae expiantur, ut eis in æternam patriam ingressus patere possit, in quam nihil coinquinatum ingreditur,*" it was also a part of that doctrine that the pains of purgatory may be alleviated or shortened, by the prayers of the living, by masses and by thanksgivings. This doctrine being declared by the Church of England to be without warranty of Scripture, the question is, whether prayer for the dead falls under the same condemnation? Now the first argument that suggests itself against this supposition is, that prayer for the dead is a practice of a much earlier date than the introduction of the doctrine of purgatory; it clearly appears that the practice of praying for the dead prevailed amongst the early, if not the earliest Christians, who at that day had no notion of the doctrine of purgatory. It would be a waste of time to travel through all the authorities which might be referred to, to prove, not only the prevalence of the practice of praying for the dead long prior to the introduction of purgatory, but also that the prayers by the primitive Christians for the souls of the departed were offered with a different intention from those who profess the Romish religion. The object of such prayers with the latter was to relieve the souls of the departed from the pains of purgatory; that of the former was, that the souls might have rest and quiet in the interval between death and the resurrection; and that at the last day they might receive the perfect consummation

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of bliss, but certainly such prayers had no reference to a state of suffering, in which the souls were supposed to be during the intermediate time. With reference to this point it will be right to state one or two passages from authors on the subject. Bishop Taylor, in his *Dissuasive from Popery* (in the tenth volume of Bishop Heber's edition) says "There are two great causes of their mistaken pretensions in this article from antiquity. The first is, that the ancient churches in their offices, and the fathers in their writings, did teach and practise respectively prayers for the dead. Now, because the church of Rome does so too, and more than so—relates her prayers to the doctrine of purgatory, and for the souls there detained—her doctors vainly suppose, that whenever the holy fathers speak of prayer for the dead they conclude for purgatory; which vain conjecture is as false as it is unreasonable; for it is true the fathers did pray for the dead—but how? 'That God should show them mercy, and hasten the resurrection, and give a blessed sentence in the great day.' But then it is also to be remembered, that they made prayers and offered for those who, by the confession of all sides, never were in purgatory, even for the patriarchs and prophets, for the apostles and evangelists, for martyrs, and confessors, and especially for the blessed Virgin Mary." And he cites authorities,—Epiphanius, St. Cyril, and others. "Upon what account," he adds, "the fathers did pray for the saints departed, and, indeed, generally for all, it is not now seasonable to discourse; but to say this only, that such general prayers for the dead as those above reckoned, the Church of England never did condemn by any

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express article, but left it in the middle. But," he adds, "she expressly condemns the doctrine of purgatory, and consequently all prayers for the dead relating to it." And in vol. xi. p. 58, he shews, that though the ancient fathers of the church did sanction prayers for the dead, they did not even know the Romish doctrine of purgatory. Again; Archbishop Usher, whose opinions upon the subject have been recently reprinted in the *Tracts for the Times*, says, "Our Romanists do commonly take it for granted, that purgatory and prayer for the dead be so closely linked together, that the one doth necessarily follow the other; but in so doing they greatly mistake the matter; for howsoever they may deal with their own devices as they please, and link their prayers with their purgatory as they list, yet shall they never be able to shew that the commemoration and prayers for the dead used by the ancient church had any relation with their purgatory."

Without reference then, to any other authorities, which are numerous on the point, it is clear that prayers for the dead are not necessarily connected with the doctrine of purgatory, since they were offered up by the primitive church long antecedent to the doctrine of purgatory being received by the Church of Rome.

But it was said that, whatever might have been the case in the early ages with respect to the practice of praying for the dead, the Church of England had taken a different view of the subject; and with reference to what had taken place in the earliest time of the Reformation; and subsequently, that though prayers for the dead were not considered, in the first in-

stance, contrary to the principles of the Christian Religion, yet that in later times they had been considered as opposed to the principles and doctrines of the Church, as had been shewn by the alterations made at different times in its Liturgy. In the Primer of Henry 8th, in the Burial and Communion Services, such prayers were used, and in the *Formula of Faith* in the time of Henry 8th, prayers for the dead were enjoined as "a pious and proper work." In the first Prayer Book also, of Edward 6th, prepared by persons of great eminence and learning, called together by the King to consider the alterations necessary to be made in the public service of the Church, in consequence of the progress of the Reformation of the established religion, such prayers were retained. It is not immaterial to see the manner in which this Prayer Book had been compiled, and I cannot refer to more satisfactory authority than the act of parliament, by which the book was established, namely, the second and third Edward 6th, c. 1, which is entitled "An Act for Uniformity of Service and Administration of the Sacraments throughout the realm," in the preamble of which it is stated, that, "with the intent that a uniform, quiet, and godly order should be had, his Highness had appointed the Archbishop of Canterbury, and certain of the most learned and discreet bishops and other learned men of the realm, to consider and ponder the premises, and thereupon having as well eye and respect to the most sincere and pure Christian Religion taught by the Scripture, as to the usages in the primitive church, should draw and make one convenient and meet order, rite and fashion of common and open prayer and administration of the Sacra-

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ments to be had and used in his Majesty's realm of England and in Wales;" and with reference to these principles the first Prayer Book of Edward 6th, was drawn up, and in this book prayers for the dead were inserted, although in some degree different from those in the Primer of Henry 8th, such prayers, therefore, were not considered by those learned persons as connected with the Romish doctrine of purgatory; but the second Prayer Book of Edward 6th, was afterwards drawn up, in which these prayers were omitted, and it was argued, that they were inconsistent with the doctrine of the Church as then established, and various authors were referred to to shew that they were omitted on that account; and several writers do take that view of the subject. But it is agreed that there is no express prohibition of such prayers; it must, therefore, be shewn that they were prohibited by necessary implication. It appears, however, from writers and historians, that these alterations in the Liturgy in the second Prayer Book of Edward 6th, were acceded to principally at the instance of Calvin and Bucer, though on what grounds precisely I have not been able to learn. But there is one authority at least to shew that it was not, because in the opinion of the majority of the persons employed in its revision, they were inconsistent with the doctrines of the Church of England. The act of parliament by which the second Prayer Book of Edward 6th, was established,—the fifth and sixth Edward 6th, c. 1, also entitled "An Act for the Uniformity of Service and administration of Sacraments throughout the Realm,"—in its recital, which must be taken to express the sentiments of the ma-

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jority of the legislature, states : " Where (whereas) there has been a very godly order set forth by the authority of parliament for common prayer and administration of the Sacraments, to be used in the mother tongue within the Church of England, agreeably to the word of God and the primitive church," adopting the words of the former act, which enjoined " a regard to the religion taught by Scripture, and to the usages in the primitive church;" " very comfortable to all good people desiring to live in Christian conversation, and most profitable to the estate of this realm, upon the which the mercy, favour, and blessing of Almighty God are in nowise so readily and plenteously poured as by common prayers, due using of the Sacraments, and often preaching of the Gospel with the devotion of the hearers;" and it goes on to state, that " yet notwithstanding a great number of people do wilfully abstain and refuse to come to their parish churches, and other places, where common prayer, the administration of the Sacraments, and preaching of the word of God, is used;" and in the fifth section it sets forth, " and because there hath arisen in the use and exercise of the aforesaid common service in the church heretofore set forth divers doubts for the fashion and manner of the ministration of the same, rather by the curiosity of the ministers and mistakers than of any other worthy cause; therefore, as well for the more plain and manifest explanation thereof, as for the more perfection of the said order of common service, in some places where it is necessary to make the same prayers and fashion of service more earnest and fit to stir Christian people to the true honouring of

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Almighty God ;” and it goes on to set forth that the king and parliament had caused the book of Common Prayer “to be faithfully and godly perused, explained, and made fully perfect.” This act was repealed by the first of Mary, which was itself repealed by the first of Elizabeth, c. 2, which restored the fifth and sixth Edward 6th. Now, up to this period of time, it seems that at least there was not any express prohibition of prayers for the dead, nor any notion that they implied a necessary belief in the doctrine of purgatory, though, in consequence of professors of the Romish religion taking advantage of the practice as an argument to support their own doctrine of purgatory, it was thought proper that the form of prayer should be altered, and those prayers omitted in the public service of the church as not being enjoined (which is admitted) or sanctioned by any warranty of Scripture.

The authorities seem to go no further than this—to shew that the church discouraged prayers for the dead, but did not prohibit them; and that the twenty-second Article is not violated by the use of such prayers. The ground on which the church consented to the omission of these prayers could not, perhaps, be better stated than by Mr. Palmer, in his *Origines Liturgicæ*, to this effect:—“When the custom of praying for the dead began in the Christian church has never been ascertained. We find traces of the practice in the second century; and either then or shortly after it appears to have been customary in all parts of the church. The first person who objected to such a prayer was Acrius, who lived in the fourth century; but his

arguments were answered by various writers, and did not produce any effect in altering the immemorial practice of praying for those that rest. Accordingly, from that time, all the liturgies in the world contain such prayers. Some persons will perhaps say, that this sort of prayer is unscriptural; that it infers either the Romish doctrine of purgatory or something else, which is contrary to the will of God, or the nature of things. But when we reflect that the great divines of the English Church have not taken this ground, and that the Church of England herself has never formally condemned prayers for the dead, but only omitted them in her Liturgy, we may perhaps think that there are some other reasons to justify that omission." And then this learned writer proceeds to state the probable reason of the omission of these prayers in the Liturgy of the English Church—namely, that they might be abused, to the prejudice of the uneducated classes, to the support of the Roman Catholic doctrine of purgatory. I am, therefore, of opinion, that in this case there has been no violation of the twenty-second Article of the church, so as to call for punishment by ecclesiastical censure. The twenty-second Article does not prohibit prayers for the dead, unless so far as they necessarily involve the doctrine of purgatory; and the inscription has not been shewn to be a violation of that Article. But it is said that other Articles of the church have been violated, and reference was made to the thirty-fifth Article, which is to this effect "That the second book of Homilies contained a godly and wholesome doctrine, and necessary for these times, as doth the former book of Homilies, which were set forth in

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the time of Edward 6th, and therefore we judge them to be read in churches by the ministers diligently and distinctly, that they may be understood of the people." And it was said that in the seventh Homily on Prayer, the practice of praying for the dead is declared to be an erroneous doctrine, and therefore, as the Homilies are directed to be read in churches for the edification of the people, it must be necessarily inferred that they are forbidden and prohibited by the Church of England. Now, if this were clearly so, it would seem somewhat extraordinary that many divines of the church should, in the face of these Articles and of the Homilies, have fallen into the error of believing that the Church of England had not prohibited prayers for the dead, but merely discouraged them; but it is still more extraordinary that, considering the violent disputes which had occurred with respect to this point, there had been no express prohibition of the practice in the articles of 1562. If it had been the intention of the church to have forbidden the practice, surely there would have been an express and distinct prohibition of it. In looking to the Homily it must be considered what was the purpose for which it was composed,—namely, to discourage the practice of praying for the dead as connected with the doctrine of purgatory; but in no part of the Homily is it declared that the practice of praying for the dead is unlawful—merely, that it is useless; that prayers for the dead could have no effect in altering the condition of the dead, and that in the word of God we have no commandment so to do: and referring to St. Chrysostom and St. Cyprian, it is said, "Let these and such other places be sufficient to take

away the gross error of purgatory out of our heads, neither let us dream any more that the souls of the dead are anything at all holpen by our prayers." It seemed clearly to have been the intention of the composer of the Homily to discourage the practice of praying for the dead; but it does not appear that in any part of the Homily he declares the practice to be an unlawful one. But supposing he had been of opinion that such prayers were unlawful, it is not to be necessarily inferred that the church of England adopted every part of the doctrines contained in the Homilies. If it had been the opinion of the framers of the Articles and Canons of the church that prayers for the dead were opposed to the Scriptures, they would have expressly declared their illegality. On this part of the case, then, I am of opinion that there has been no violation of any of the Articles of the church. No other Articles have been referred to specifically to make out the proposition, that the church considered prayers for the dead as an illegal practice. But it was urged in this case, that the person by whom the tombstone was erected being a Roman Catholic, it must be supposed that the invitation contained in the inscription, to pray for the dead, has a necessary reference to the doctrine of purgatory as received by the church of which she is a member; and that the inscription must be taken in a Roman Catholic sense because, the quotation from the Maccabees was taken from the Roman Catholic version of the Bible, and not from that authorized by the Church of England. Now I do not think this argument sufficient to authorize me to put any other construction on the inscription than the words will bear, according to

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their plain meaning. It is true that the version does not agree with the English translation (in fact, in our translation, there is not a 46th verse in the 12th chapter of Maccabees); but the question is not, whether the version is correct or not, but whether the meaning is or is not inconsistent with that contained in the English version? Now it is impossible to read the English version and not see that the sense of the quotation is the same in both; and that the reconciliation spoken of by Judas meant a reconciliation of the dead, with a view to the resurrection. Whether the doctrine is taken from the text according to the Romish or English version, the question is, whether it is a violation of the Articles, Canons, and Constitutions of our church? That is the view I must take of the case, sitting here as an ecclesiastical judge. If anything arose from the circumstance of the party being a Roman Catholic, or from the sense in which the words of the inscription are understood by the Romish church, it should have been specifically pleaded; for the Court has no judicial information of the existence of a Roman Catholic Bible. I shall conclude this part of the case with one observation—what has been the practice of eminent divines of the Church of England? It was correctly stated in the argument, that an inscription was placed on the tombstone of Bishop Barrow, in the cathedral of St. Asaph, in 1680, to this effect; “O vos, transeuntes in domum Domini, in domum orationis, orate pro conservo vestro, ut inveniat misericordiam in die Domini.” It is not possible to conceive that Bishop Barrow would have suffered such an inscription to have been placed upon his tomb if he

had believed that it was contrary to the doctrine and discipline of the church to which he had belonged.

I am then of opinion, on the whole of the case, that the offence imputed by the Articles has not been sustained; that no authority or canon has been pointed out by which the practice of praying for the dead has been expressly prohibited; and I am accordingly of opinion, that, if the Articles were proved, the facts would not subject the party to ecclesiastical censure, as far as regards the illegality of the inscription on the tombstone. That part of the Articles must, therefore, be rejected.

The other branch of the case is subject to different considerations—namely, the erection of the stone without the consent of the incumbent, which is an ecclesiastical offence. It has been suggested in the argument, that the proceeding on this branch of the case should have been in the civil form, by monition; but it seems to me that this is the proper form of proceeding; I am not aware of any case in which a different form has been followed. But this offence was not specified in the decree, or citation, served on the party. The only ground of illegality on the face of the citation consisted in the inscription; the erecting, or causing to be erected, a monument, without the leave of the incumbent, is a distinct and separate offence, which should have been set forth in the citation, in order that the party cited might know what she was called upon to answer. I am clearly of opinion that, according to the law and practice of the court, the citation was insufficient to raise the question whether the consent of the incumbent had been

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obtained or not; and on this part of the case, likewise, I am of opinion that the Articles are inadmissible. The Court, therefore, on this view of the case, is bound to reject the Articles altogether, and to dismiss the party, and with costs.

PREROGATIVE COURT OF CANTERBURY.

ISABELLA STEWART, *deceased.*

1838.

On Motion.

Jan. 17th.

Administra-
tion of the ef-
fects of a party
deceased, and
domiciled in
Scotland, gran-
ted according
to the law of
Scotland, on
proof of the
law by affi-
davit from a
Scotch solic-
tor.

Isabella Stewart, of Dundee, died intestate, a spinster, on the 29th of May, 1837, without a father, leaving her mother, and James Stewart, her brother, her surviving, and no other brother or sister.

Jenner, prayed administration of the effects of the deceased to be granted to the brother, upon an affidavit from J. A. Cameron, of Bamff, solicitor, stating that by the law of Scotland, in case of a brother or sister dying intestate, and leaving either father or mother, the personal property of the deceased descends to his or her brothers or sisters equally, or if one, to that one alone, to the exclusion of both or either of the parents.

The Court granted the administration as prayed.

In the goods of GILES SHAW, *deceased*.

1838.

May 15th.

Giles Shaw died on the 10th of April last, leaving a widow and one child; he executed a will in 1833, in which the whole of his property was given to his wife. In March last, when in a state of delirium, he snatched his will from his wife, and tore off a part of it; afterwards, when he recovered his senses, he declared to a person who sat up with him, his regret at having torn the will, and that he wished his will should operate.

A will torn by the testator when in a delirious state not revoked. Probate of such will granted on motion.

Upon affidavit of the above facts, *Blake* prayed probate of the will.

SIR HERBERT JENNER.

The deceased, in this case, died in April last, leaving a will, executed by him in 1833, in which he gave all his property to his wife absolutely; he left a daughter of the age of six years, who was, therefore, born before the date of the will. It appears that, when delirious, he tore off a part of the will; now, the presumption from this act, if unexplained, would be against the instrument, but it appears that the deceased, when restored to his senses, expressed his regret at having torn the will, and his wishes that it should operate; and his reason for having excluded the daughter, because she was provided for by her grandmother, and he had adhered to the will for five years. There being sufficient to satisfy the Court that the act was done by the deceased when in a state of incapacity, it will allow probate of the will to pass.

1838.

In the goods of JOHN LIVOCK, *deceased*.

May 29th.

A testator, after the 1st of January, 1838, having obliterated the word *three* or *five*, and substituted the word *one*, in a will made in 1837, the alteration not being attested as required by stat. 1 Vict. c. 26. Probate granted in blank.

The deceased left a will, dated the 22nd of February, 1837, in which there had been a legacy of three or five hundred pounds to John Bennett; in March, 1838, the deceased erased the word three or five, (whichever it was), and inserted the word one. This alteration was not attested as required by the 21st sect. of the stat. 1 Vict. c. 26.

Blake prayed probate of the will with the legacy of *one* hundred pounds, contending that the Court, under the 21st section of the act, might so decree the probate, that section enacting, that "no obliteration, interlineation, or other *alteration*, made in any will, after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, &c.," which was precisely this case, as it is impossible to say what the word was before the alteration, and unless the Court would grant probate with the word one as it stood, the legacy would be entirely lost.

Addams, amicus curiæ. That construction would amount to a repeal of the act.

SIR HERBERT JENNER.

It is impossible to maintain that the word one, which has been substituted, can stand.

The 34th section is also worthy of consideration, which declares that the act shall not extend to wills

made before the 1st of January, 1838; now, the interpretation which the Court puts upon this clause is this, that the act shall not extend to any will made between the passing of the statute, (the 3rd of July, 1837) and the 1st of January, 1838, but that in any alterations made after January, 1838, to wills previously executed, the requisites of the act must be complied with.

1836.

May 29th.

In the goods of
JOHN LIVOCK.

Probate to pass of the will in blank without the word, one.

In the goods of SAMUEL JOSEPH, *deceased*.

1838.

June 12th.

Haggard prayed administration of the effects of Samuel Joseph, deceased, to be granted to the secretary of the Jewish Synagogue, under the following circumstances:—The deceased died on the 16th of April, 1838, a bachelor, without parent; and intestate, leaving a sister, Sarah Joseph, spinster, his only next of kin, the only person entitled to his personal estate.

Administration of the effects of a Jew granted to the secretary of the Great Synagogue, for the use and benefit of the next of kin (a Jewess) who was of unsound mind, during her lunacy, her next of kin having been first cited.

Sarah Joseph was of unsound mind, and her next of kin were her cousins, Samuel Barnett and Hyam Barnett.

The parties were all Jews, and the wardens of the Great Synagogue, in order that the property of the deceased might be applied to her benefit, had requested and authorized Moses Ansell, their secretary, to apply for letters of administration of the deceased's effects for that purpose, during her in-

1838. capacity. Samuel Barnett consented to the administration passing as prayed; but Hyam Barnett had declined to consent. The Court refused to grant the administration until Hyam Barnett had been first cited.

July 12th.
In the goods of
SAM. JOSEPH.

A decree was afterwards taken out against Sarah Joseph, the sister of the deceased, and Hyam Barnett, calling upon the former to accept or refuse the administration, and upon the latter, in the event of her refusing, declining, or being incapable of taking upon herself such letters of administration, to shew cause why the same should not be granted to Mr. Moses Ansell, the secretary of the Great Synagogue, for her use and benefit during her lunacy.

1838.

Nov. 14.

This decree being duly served, and no appearance given. The Court granted the administration as prayed, upon an inventory being exhibited, and the sureties justifying. The property of the deceased amounted to about 212*l*.

1838.

August 7th.

In the goods of CORNELIUS REGAN, *deceased*.

The signature to a will, if acknowledged by the testator in the presence of two witnesses present at the same time, &c. is sufficient, whether the signature be made by the testator, or by another for him.

The deceased in this case died on the 26th of March, 1838. Upon the previous day a will was drawn up in writing, giving the whole of the deceased's property to his wife, and which he signed in the presence of one witness only.

After the will had been so signed it was read over to the deceased by Elizabeth Smith, in the presence and hearing of John Regan, his brother, and Elizabeth Miller, the deceased then expressed

his approbation of the same, and acknowledged the signature thereto to be in his handwriting, and then requested the three persons to attest the same as witnesses, which they did in the presence of the deceased and of each other.

1838.

August 7th.

In the goods of
CORNELIUS
REGAN.

Addams prayed administration to the widow, the universal legatee, there being no executor named; some difficulty had arisen, as to whether this was a due execution under the stat. 1 Vict. c. 26.

SIR HERBERT JENNER.

The deceased died in March last, he made his will, and signed it in the presence of one witness; he afterwards acknowledged his signature in the presence of three witnesses present at the same time, who attested it in his presence; the 9th section of the act, 1 Vict. c. 26, enacts, that a will shall be signed at the foot or end thereof by the testator or by some other person in his presence, and by his direction; and that, "such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time," it has been suggested that the word "acknowledged" refers only to a signature when made for the testator by another person: but I am of opinion that the acknowledgment by the testator of his own signature or the signature made by some other person in his presence, and by his direction, is sufficient, if attested as required by the act.

Administration with will annexed, granted.

1838.

August 7th.

Administra-
tion for the use
and benefit of
minor children
of a French-
man, deceased,
granted to their
guardian, ap-
pointed by the
French autho-
rities.

In the goods of PETER URBANUS SARTORIS, *deceased*.

Peter Urbanus Sartoris, late of the city of Paris, banker, died on the 30th of November, 1833, a widower, intestate, leaving him surviving, Edward John Sartoris, Eliza Henrietta, (wife of the Count de l'Aigle) and four other children, who were minors.

Edward John Sartoris being in Egypt, and the Countess de l'Aigle having renounced her right to the administration of the deceased's effects, a decree was extracted at the instance of John Lewis Greffulhe, who had been duly appointed guardian to the minors, by the lawful authorities of the city of Paris, citing the said Edward John Sartoris, to accept or refuse administration of the goods of the deceased, otherwise to shew cause why the same should not be granted to the said J. L. Greffulhe, for the benefit of the said minors. This decree having been duly served on the exchange holden at the Guildhall of London, and no appearance given,

Haggard, moved the Court to grant the administration to the guardian of the minors, and

The Court decreed the administration as prayed: an inventory to be exhibited, and the sureties to justify.

In the goods of the Rev. BARTON SHUTTLEWORTH,
deceased.

1838.

Nov. 6th.

The Rev. Barton Shuttleworth died on the 21st of October, 1838, a bachelor, leaving a brother and sister his only next of kin. In September, 1837, the deceased being seriously ill, sent for a solicitor to make his will. Upon the arrival of the solicitor, the deceased stated that he wished to bequeathe the whole of his property to his nephew, Barton Nicholas, who resided with him as a companion, and that he had no other bequest to make.

The executor and universal legatee, being by mistake described in the will in the wrong name. Probate granted to him in his proper name, upon consent of the parties interested.

The disposition of the property being very simple, and the deceased being very ill, the solicitor forthwith, in the deceased's presence, drew up the will in writing, and from the deceased's dictation, inserted the name of the deceased's nephew, Barton Nicholas, but being unacquainted with the nephew's surname, through misapprehension of the deceased's description, inserted the names Barton Nicholas Shuttleworth instead of Barton Nicholas Bayley, Bayley being the proper name of the nephew. The nephew was also appointed sole executor. The will, with such mistake in the surname, was executed by the deceased on the 29th of September, 1837, and the mistake was not discovered until after the deceased's death.

Upon an affidavit of the above facts from the solicitor who drew the will, and from the brother of the deceased, who deposed that the deceased had no nephew at any time who resided with him, saving Barton Nicholas Bayley, and that the de-

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the time of Edward 6th, and therefore we judge them to be read in churches by the ministers diligently and distinctly, that they may be understood of the people." And it was said that in the seventh Homily on Prayer, the practice of praying for the dead is declared to be an erroneous doctrine, and therefore, as the Homilies are directed to be read in churches for the edification of the people, it must be necessarily inferred that they are forbidden and prohibited by the Church of England. Now, if this were clearly so, it would seem somewhat extraordinary that many divines of the church should, in the face of these Articles and of the Homilies, have fallen into the error of believing that the Church of England had not prohibited prayers for the dead, but merely discouraged them; but it is still more extraordinary that, considering the violent disputes which had occurred with respect to this point, there had been no express prohibition of the practice in the articles of 1562. If it had been the intention of the church to have forbidden the practice, surely there would have been an express and distinct prohibition of it. In looking to the Homily it must be considered what was the purpose for which it was composed,—namely, to discourage the practice of praying for the dead as connected with the doctrine of purgatory; but in no part of the Homily is it declared that the practice of praying for the dead is unlawful—merely, that it is useless; that prayers for the dead could have no effect in altering the condition of the dead, and that in the word of God we have no commandment so to do: and referring to St. Chrysostom and St. Cyprian, it is said, "Let these and such other places be sufficient to take

In the goods of JAMES AYLING, *deceased*.

1838.

Nov. 14th.

The deceased in this case left a will, dated the 15th May, 1838, which he signed at the foot, and there were the names of two witnesses on the will, as having attested the execution; but the attestation clause not being full, an affidavit was required by the registrars, (agreeably to the directions of the Court) to shew that the statute had been complied with, when it appeared that the witnesses were not present at the same time, as required by the 9th section of the act. Under these circumstances, *Robertson* prayed the Court to decree administration of the effects of the deceased, as dead intestate.

Where there is a will with the signature of the deceased at the foot thereof, with the names of two witnesses subscribed to it, the Court will not, on motion upon affidavit, *ex parte*, that the will was not duly executed, decree the deceased to be dead intestate.

SIR HERBERT JENNER.

The Court cannot decree administration to pass of the effects of the deceased as dead intestate, unless the will has been propounded.

Although, from what appears in the present case, it is clear that this will is invalid, under the statute 1 Vict. c. 26; yet this is only on affidavits *ex parte*, there might, therefore, be collusion. All that the Court will do in such cases is to reject the prayer for probate, leaving the parties to take out administration if they think proper; as, notwithstanding the Court declines to grant probate, the will might be propounded and established.

1838.

In the goods of THOMAS NEWMAN, deceased.

Nov. 30th.

Probate of a codicil signed by the deceased in the presence of two witnesses present at the same time, but not attested in the presence of the testator, refused, under 1 Vict. c. 26.

The deceased died on the 11th of September, 1838. He left a will with a codicil thereto, dated in 1834. On the day of his death he executed a second codicil, by signing the same in the presence of two witnesses present at the same time, but the testator being very ill, they removed into another room, where they subscribed their names as witnesses.

Robinson prayed probate of the will and two codicils.

The Court refused to grant probate of the second codicil, the same not having been attested in the presence of the testator, as required by the 9th section of 1 Vict. c. 26.

1838.

In the goods of JOHN BAILEY.

Dec. 21st

A will signed for the testator by one of the witnesses who attested the execution, valid, under stat. 1 Vict. c. 26, s. 9

John Bailey died on the 30th of November, 1838, having executed his will on the 8th of that month, in the following manner, namely: The name of the deceased was signed by Robert Harvey, one of the subscribed witnesses, at the foot thereof, by the deceased's direction, in his presence, and also in the presence of Matthew Smith, the other subscribed witness, who was present at the same time, and who, as well as Robert Harvey, attested the will in the presence of the deceased.

Phillimore, upon the affidavit of Robert Harvey, stating the above circumstances, prayed probate of the will.

1838.

Dec. 21st.

In the goods of
JOHN BAILEY.

SIR HERBERT JENNER.

The question is, whether this will is duly executed under the 9th section of the act, 1 Vict. c. 26, which enacts, that a will “shall be signed at the foot or end thereof, by the testator, or by some other person, in his presence and by his direction, and such signature shall be made or acknowledged by the testator, in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator.” In this case, the person who signed the testator’s name at his request, was one of the witnesses who attested the execution of the instrument; all that the act requires is, that the will shall be signed by the testator, or by some person for him, in the presence of two witnesses, who shall attest the same; there is nothing which prevents the person making the signature for the testator, being one of the witnesses to attest and subscribe the will. I am of opinion that this is a good execution under the statute.

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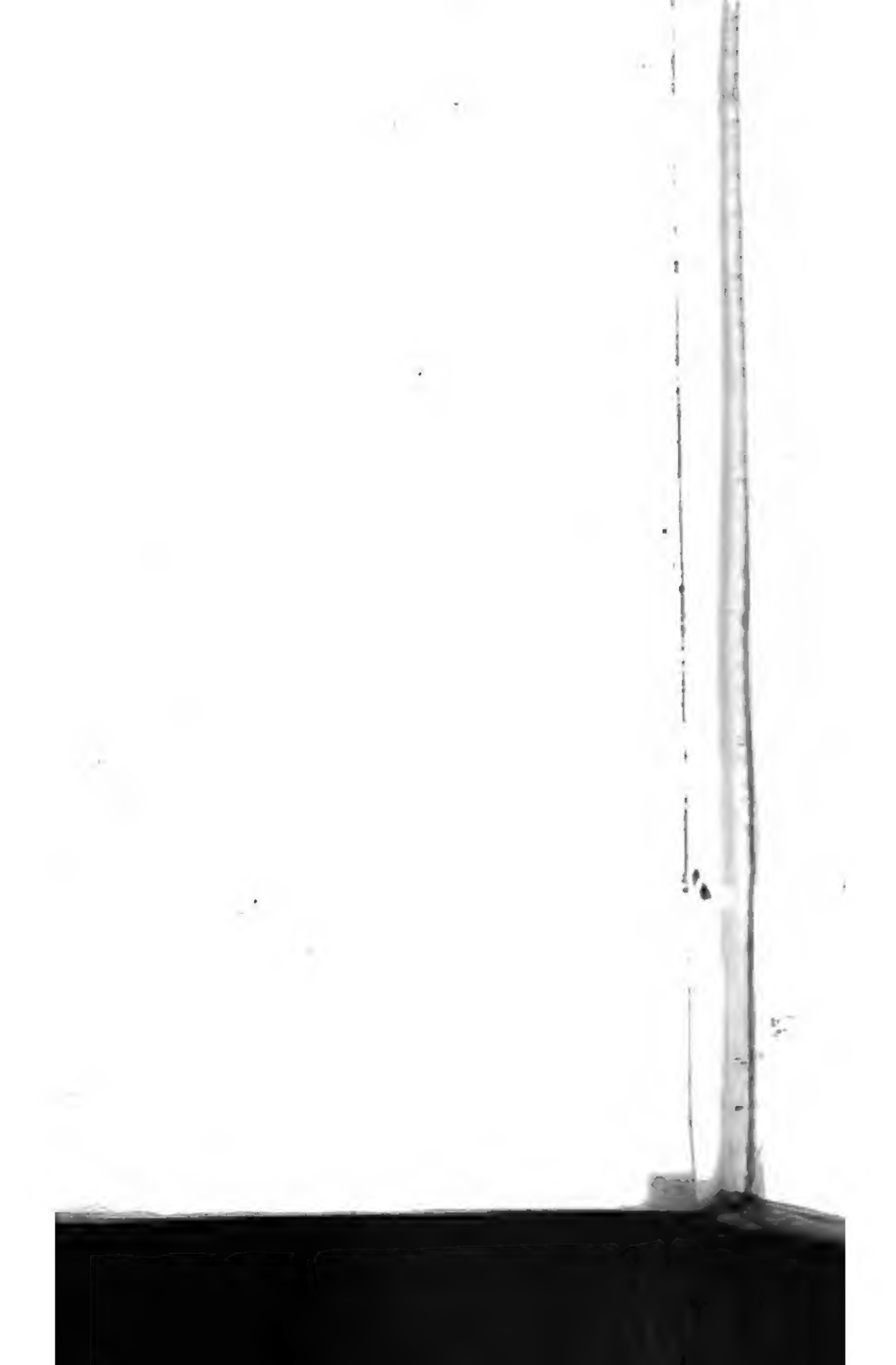
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